Number 440.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1922.

NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL., PLAINTIFFS IN ERROR.

V.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER AND THEIR DEPUTIES, SUBORDINATES AND ASSISTANTS, DEFENDANTS IN ERROR.

MOTION.

The above named defendants in error, by their attorney, Clarence A. Davis, Attorney General of the State of Nebraska, respectfully move, under Subdivision 8 of Rule 26, of the Supreme Court of the United States, to consolidate the above entitled case with the case entitled *Robert T. Meyer, Plaintiff in Error,* v. *The State of Nebraska,* No. 325 (General Number 26823), and for permission to argue the above entitled case with the case of *Meyer* v. *The State* as a case involving the same question.

CLARENCE A. DAVIS,
Attorney General of the State of Nebraska,
Attorney for Defendants in Error.

Lincoln, Nebraska,
[illegible] 6, 1922.

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NOTICE OF SUBMISSION OF MOTION TO CONSOLIDATE CASE FOR ARGUMENT.

You will please take notice that on the annexed statement of facts, verified December 5, 1922, by Mason Wheeler as Assistant Attorney General of the State of Nebraska, and upon the printed record herein, there will be submitted to the Supreme Court of the United States, without oral argument, at a stated term thereof, on Monday, December 18, 1922, at the Capitol, in the City of Washington, in the District of Columbia, a motion of which the foregoing is a copy.

CLARENCE A. DAVIS,
Attorney General of the State of Nebraska,
Attorney for Defendants in Error.

Lincoln, Nebraska,
December 6, 1922.
To Arthur F. Mullen, Esq.,
First National Bank Building,
Omaha, Nebraska,

Attorney for Plaintiffs in Error:

Service of the above motion with notice thereof is hereby acknowledged this 6th day of December, 1922, and the entry of an order granting leave to argue this case at the same time and with the case of *Meyer* v. *State*, No. 325, October term, 1922, is hereby consented to.

ARTHUR F. MULLEN,
Attorney for Plaintiffs in Error.

December 6, 1922.

Number 440.

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NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL., PLAINTIFFS IN ERROR.

V.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER AND THEIR DEPUTIES, SUBORDINATES AND ASSISTANTS, DEFENDANTS IN ERROR.

VERIFIED STATEMENT OF FACTS.

UNITED STATES OF AMERICA,
STATE OF NEBRASKA, } ss.
COUNTY OF LANCASTER,

Mason Wheeler, being first duly sworn, deposes and says that he is one of the Assistant Attorneys General of the State of Nebraska, and that he has had charge of this case from its inception, and that:

This case involves the validity under the Constitution of the United States of the foreign language law of the State of Nebraska, known as the Norval Act, approved April 14, 1921, and contained in Sections 6457 to 6462, Compiled Statutes of Nebraska, 1922.

The statute prohibits instruction in foreign languages in schools to children who have not passed the eighth grade. The validity of this legislation is attacked in this court on the ground that such legislation is not a legitimate exercise of the police power of the state, that it violates the Fourteenth Amendment to the Constitution of the United States, is an unreasonable and arbitrary classification, deprives persons of their liberty and property without due process of law, and interferes with the exercise of religious liberty. The validity of the statute was sustained by the Supreme Court of the State of Nebraska, and the matter comes before this court by writ of error.

The case of *Robert T. Meyer* v. *The State of Nebraska*, No. 325, October term, 1922, involves the validity, under the Constitution of the United States, of the foreign language law of the State of Nebraska, known as the Siman Law, Chapter 249 of the Laws of Nebraska of 1919, which statute also prohibits instruction in foreign languages in schools to children who have not passed the eighth grade. In the Meyer case the legislation is also attacked on the ground that it violates the Fourteenth Amendment of the Constitution of the United States, deprives the plaintiff in error of his liberty, abridges his privileges and immunities as a citizen of the United States, and is not a legitimate exercise of the police power.

These two cases involve substantially the same questions and might well be argued together with resultant advantage both to the court and to counsel.

These cases are of considerable public interest to and in the State of Nebraska. In the case at bar, in the district court of the State of Nebraska, an injunction was granted restraining the governor, attorney general and the county attorney from enforcing the statute. Although the holding of the district court was reversed by the Supreme Court of the State of eNbraska, supersedeas bond was allowed by the Chief

Justice of the Supreme Court of the State of Nebraska, and the injunction against the enforcement of the statute continued until the order of the Supreme Court of the United States.

The case of *Meyer* v. *State*, No. 325, October term, 1922, will be reached on the calendar of this court ahead of this case, and an advanced hearing is desired in both cases, a concurrent motion to advance the Meyer case as a criminal case being submitted with this motion. The record and briefs in both cases have been printed, served and filed and both cases are now ready for argument.

This application for leave to argue this case with the case of *Meyer* v. *State* is made under subdivision 8 of Rule 26 of the Supreme Court of the United States, which provides:

> "Two or more cases involving the same question may by leave of the court be heard together, but they must be argued as one case."

MASON WHEELER.

Subscribed and sworn to before me this 6th day of December, 1922.

[NOTARIAL SEAL] FRIEDA C. BAYERLEIN,
Notary Public in and for Lancaster County, Nebraska.

Number 440.

IN THE

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NEBRASKA DISTRICT OF EVANGELICAL LUTHERAN SYNOD OF MISSOURI, OHIO, AND OTHER STATES, ET AL., PLAINTIFFS IN ERROR.

V.

SAMUEL R. McKELVIE, CLARENCE A. DAVIS, OTTO F. WALTER AND THEIR DEPUTIES, SUBORDINATES AND ASSISTANTS, DEFENDANTS IN ERROR.

ORDER.

Upon reading and filing the annexed notice, motion of Defendants in Error, statement of facts verified December 6, 1922, and upon consent of Arthur F. Mullen, Esq., attorney for Plaintiffs in Error, it is hereby ordered that the case entitled *Nebraska District of Evangelical Lutheran Synod of Missouri, Ohio, and Other States, et al.*, v. *Samuel R. McKelvie, et al.*, No. 440, October term, 1922, be consolidated with and argued at the same time as the case of *Robert T. Meyer* v. *The State of Nebraska*, No. 325, October term, 1922, on the ground that these two cases involve the same legal question.

.....

Chief Justice of the Supreme Court of the United States.

Washington, D. C.,
December ....., 1922.

The entry of the foregoing order is hereby consented to.

ARTHUR F. MULLEN,
Attorney for Plaintiffs in Error.

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ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

CLARENCE A. DAVIS, Attorney General
of the State of Nebraska,
Lincoln, Nebraska,
Attorney for Defendants in Error,

MASON WHEELER, Assistant Attorney General,
GUY C. CHAMBERS,
C. L. DORT, Assistant Attorney General,
CHARLES S. REED, Assistant Attorney General,
JACKSON B. CHASE, Assistant Attorney General,
Of Counsel.

STATEMENT.

A judgment of the supreme court of Nebraska sustaining as against federal constitutional objections the Nebraska foreign

language legislation enacted April 14, 1921, is questioned in this court by writ of error.

The statute in question, Chapter 61 of the Laws of Nebraska for 1921, found in Sections 6457 to 6462, Compiled Statutes of Nebraska of 1922, and hereinafter referred to as the Norval Act is as follows:

> "ENGLISH, OFFICIAL LANGUAGE.—The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.
>
> "OTHER LANGUAGES, TEACHING FORBIDDEN.—No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.
>
> "SAME, EXCEPTIONS.—Languages other than the English language may be taught as languages only, after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided, that nothing in this act shall prohibit any person from teaching his own children in his own home any foreign language.
>
> "UNLAWFUL TO DISCRIMINATE.—It shall be unlawful for any organization, whether social, religious or commercial, to prohibit, forbid or discriminate against the use of the English language in any meeting, school or proceeding, and for any officer, director, member or person in authority in any organization to pass, promul-

gate, connive at, publish, enforce or attempt to enforce any such prohibition or discrimination.

"VIOLATION, PENALTY.—Any public official, teacher, instructor, or other person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof be fined in any sum not exceeding one hundred ($100.00) dollars or less than twenty-five ($25.00) dollars, or be confined in the county jail for a period not exceeding thirty days for each offense.

"SECTIONS INDEPENDENT.—Should the courts declare any portion of this act unconstitutional such decision shall affect only the portion so declared to be unconstitutional and shall not affect any other section or any other part of this act, and it is further provided that each part of this act so far as an inducement for the passage of this act is concerned is independent of every other part.

"REPEAL.—Chapter 249, of the Session Laws of Nebraska for 1919, entitled, 'An Act relating to the teaching of foreign languages in the State of Nebraska,' is hereby repealed.

"EMERGENCY.—Whereas, an emergency exists this act shall be in force from and after its passage and approval."

Approved April 14, 1921.

It is urged by plaintiffs in error that this legislation deprives them of their property without due process of law, that it unreasonably restrains them of their liberty, that it unjustly discriminates against them, that it denies them equal protection of the law, that it interferes with their right of religious worship and that it is not a reasonable exercise of the police power (Plaintiffs' assignments of error, record pages 91 and 92).

The history of foreign language legislation in Nebraska is interesting. Prior to its repeal in 1918, Nebraska had a statute requiring instruction in foreign languages in grade

schools whenever requested by the parents of fifty pupils of such schools. This statute was sustained by the supreme court of Nebraska in *State ex rel Thayer* v. *School District*, 99 Neb. 338. After the repeal of this law, which had been invoked to compel instruction in German and on April 9, 1919, the Nebraska Legislature enacted the foreign language law known as the Siman Act (Chapter 249 of the Laws of 1919) which reads as follows:

> "INSTRUCTION IN FOREIGN LANGUAGES PROHIBITED.—No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any other language than the English language.
>
> "SAME, EXCEPTION.—Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.
>
> "VIOLATION, PENALTY.—Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five ($25) dollars, nor more than one hundred ($100) dollars or be confined in the county jail for any period not exceeding thirty days for each offense."

An immediate attack was made in the state courts upon the constitutionality of this law. On December 26, 1919, the Supreme Court of Nebraska, in the case of *Nebraska District of Evangelical Lutheran Synod of Missouri, et al* v. *McKelvie, the Governor, et al,* reported in 104 Neb. 93, held the Siman law constitutional, dissolved the injunction previously issued against its enforcement, and in its decision construed the statute to permit the teaching of foreign languages to children beneath the eighth grade outside of regular school hours.

Immediately after this decision a Lutheran parochial school in January, 1920, in an attempt to evade the law, by vote of

the board changed the hours of the afternoon session of the school from 1 P. M. to 4 P. M. to 1:30 P. M. to 4 P. M. The time from noon until 1:30 P. M. was specified as a recess. The school however, was convened at 1 P. M. and instruction given in German from 1 P. M. to 1:30 P. M. Of course, if the school hours could be changed to allow a half hour of recess that could be devoted to the teaching of foreign languages to young children the school hours could be so changed as to include a four-hour recess in which instruction in foreign languages could be given to minor children, and the purpose of the statute nullified *(State* v. *Meyer,* 187 Northwestern 100).

In order to sustain the legislation of 1919 the constitutional convention which met in the winter of 1919-1920 to formulate a new constitution for the State of Nebraska inserted this provision in the bill of rights:

> "The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denomination and parochial schools" (Section 27, Article I, Constitution of Nebraska, adopted by referendum vote at special election held September 21, 1920).

During the pendency of the appeal to the supreme court of Nebraska from the judgment of the district court in the Meyer case, 187 Northwestern 100, perhaps because the result of the appeal was feared by the legislature then in session, the Siman Act was repealed and replaced by the Norval Act, set forth on pages 2-3 of this brief. From an examination of the latter legislation the intention appears to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade. The statute permits the use of foreign languages in Sunday Schools, so as not to interfere with bona fide religion; permits the teaching by a parent of

his own children in his own home; prohibits any organization from discriminating against the use of the English language, declaring that no organization shall in Nebraska promulgate the rule "English Verboten"; provides that foreign languages may be taught to children who have passed the eighth grade examination, and does not prohibit the use of or speech in any foreign language by mature persons.

Notwithstanding the decision of the supreme court of Nebraska upholding the Siman law in *Evangelical Lutheran Synod* v. *McKelvie,* 104 Neb. 93, and in *State* v. *Meyer,* 187 Northwestern 100, the Norval law was again attacked on alleged grounds of unconstitutionality, and in fact a district court judge held that the act did not apply to parochial schools (Record p. 19). Upon appeal to the supreme court of Nebraska the district court was reversed and the statute upheld as against all constitutional objections (Record pp. 82 to 86).

It is well to note that Chief Justice Morrissey, one of the two dissenting judges in a court of seven, in allowing the writ of error to this court stayed the mandate of the Supreme Court of Nebraska dissolving the injunction issued by the district court until, the further order of the Supreme Court of the United States (Record p. 95) and continued in force the injunction of the district court restraining the governor, the attorney general and the county attorney of Platte county from enforcing the statute. Although enacted April 14, 1921, this legislation has been so held up by injunction proceedings that as yet it has never had a fair trial.

THE PLEADINGS.

Although its correct name is Nebraska District of *German* Evangelical Lutheran Synod (see certificate of Secretary of State, defendant's Exhibit "B," p. 58 of the record), for the purpose of bringing this action plaintiff dropped its Germanic designation and assumed the name of Nebraska District of Evangelical Lutheran Synod. Not even entering equity with

the proverbial clean hands, but even alleging that it was a law-breaker, that it had in the past and continues to teach German to young children in violation of the Nebraska statute (Par. 5 of petition, p. 4 of the record) plaintiffs depart from their religious field and attempt the secular activity of enjoining the enforcement of the statute on the grounds that said statute is unconstitutional. Plaintiffs claim that at some time they expect to supplant German with English, but assert they themselves will determine the proper time to do so, and decline to do so when the people of the state as represented in the legislature decree they shall (Par. 5 petition, p. 4 of record).

In form the action was one for an injunction restraining the governor, the attorney general and a county attorney from enforcing the statute. The petition alleges that plaintiffs have some $250,000 invested in educational institutions throughout the state; that in such institutions German has been taught to pupils under the ninth grade; that it is necessary and desirable to impart religious instruction in German; that the enforcement of the foreign language statute would impair the property rights of the plaintiffs, the usefulness and prestige of its schools; would deprive plaintiffs of their liberty and property without due process of law, and that the statute is an unwarranted interference with the exercise of religious liberty and free speech. The Germanic element in Nebraska is represented by the plaintiffs. A few Poles are represented by John Siedlik, the intervenor. Our other citizens of foreign birth, the Scandinavians, Italians and Chinamen, content perhaps to remain plain Americans, are not represented by counsel in this controversy (Petition, record pp. 2 to 13).

The answer of the defendants denies the allegations of the petition that the statute interferes with religious instruction; denies that it impairs the good will and property rights of the plaintiffs' schools; denies that it interferes with liberty and property without due process of law; asserts that plaintiffs

have an adequate remedy at law, and justifies the enactment of the foreign language statute under the police power of the state as desirable for the public welfare and necessary for the public safety.

The answer alleges that a considerable portion of the population of Nebraska is either foreign born or of foreign parentage with a natural tendency toward foreign ideals and ideas of government, and with a natural hesitancy to adopt and assimilate American customs, ideas, methods and form of government; that the continued success of the republican system of government adopted by the United States of America since its inception, is dependent upon a uniformly enlightened American citizenship in full sympathy with the ideals of this nation; that for some time there has been an effort to foster and maintain foreign customs, languages and ideals in some communities and to check the growing Americanization of such communities and to render said communities immune from all influences except those presented by leaders employing a foreign tongue; that the method commonly used has been to preserve and propagate the use of foreign languages in such communities in order that said communities might remain subject to the sole influence of foreign newspapers and foreign leaders; that the method of permanently establishing foreign languages in said communities has been to educate the children of said communities in foreign languages before the child was thoroughly grounded in English; that this insidious foreign propaganda has been extensively carried on under the guise of both education and religion, and by the foreign press; and that in order to remedy this situation, which threatens the safety, peace, good order, well being and social welfare of the state and bids fair to assume the proportion of a social menace, to limit the fields available for foreign propaganda, to insure the percolation of the fundamental principles of Americanization into said communities, that the Nebraska Legislature enacted the statute known as the Norval Act set forth on pages 2-3 of this brief (Answer of defendant, record p. 14 to 16).

THE EVIDENCE.

At the hearing in the district court, plaintiffs called four witnesses to substantiate the controverted portions of the petition, two of witnesses being Lutheran ministers, the third a Catholic priest and the fourth John Siedlik, a Pole employed in the Omaha stockyards. The ministers testified that the parochial schools were maintained by the church for religious purposes, that in standards and equipment they equalled the public schools; that approximately 10% of the Lutheran parishioners did not understand enough English to participate in religious exercises, and that they thought exclusive use of English in parochial schools might affect their prestige and attendance (Testimony of Rev. Erk, record pp. 24, 30, 31, Qs. 26 to 28, 88, 95-123; Rev. Brommer, record pp. 42, 43, Qs. 248 and 249.

The Reverend Erk testified that as far as his parishioners were concerned that *"In matters of religion the language of their heart is the German language"* (Record p. 25, Q. 35). On cross-examination he testified that the 10% of his parishioners, who did not have sufficient knowledge of the English language to comprehend religious services were the older people; that the church had never made any attempt to teach the older persons English, but had confined their efforts to teaching the young people German (Record pp. 30 and 31, Qs. 94 to 103); that with those who had received their training in the German language, that German was the language of the heart (Record p. 33, Qs. 127 and 128).

Rev. Brommer on cross-examination testified that a number of his parishioners had acquired sufficient knowledge of the English language in business transactions to do business in English, but that they did not understand sufficient English to take part in religious exercises, and admitted that if there was more English used in the church his parishioners could learn religious English just as they had learned business English (Record pp. 43 and 44, Qs. 264 to 268).

John Siedlik testified that his children talked English, but learned Polish from their mother (Record pp. 50 and 51, Qs. 377 to 384). Consequently it was unnecessary for John Siedlik's children to study Polish in the parochial school in order to take part in religious exercises. Siedlik testified that his wife had no trouble in giving religious instruction in Polish to her children in her own home (Record p. 51, Qs. 382 to 384).

The testimony is of little help in the determination of the controverted portions of the petition. The defendants were not permitted to show the situation which the legislature was designed to remedy on the ground that this was a matter to be determined by the legislature (Record pp. 58 and 59).

The testimony falls short of substantiating the allegation of the complaint that the property rights of the plaintiffs would be substantially affected by compliance with the foreign language statute. The reliability of the opinion evidence tendered by plaintiffs' witnesses to the effect that parochial schools afforded the same educational facilities as the public schools (Testimony of Rev. Erk, record p. 24, Qs. 26 to 28) is discredited by the depositions of Lillian Baldridge, Ada Halderman and C. M. Metheny offered by the defendants. These witnesses, one a teacher of long experience, and the other two school officials, after an examination of the parochial schools at Scottsbluff, Bayard and Minatare, Nebraska, testified that plaintiffs' parochial schools were far below the standards of public schools; that their teachers had little training for primary work; that they had insufficient text books; that one teacher supervised seventy pupils in the parochial school while in the public school each teacher was only required to supervise thirty-five; that the parochial schools had no history text books, made no attempt to teach civics or citizenship (Deposition of Lillian Baldridge, record pp. 62-64); that their text books and library facilities were insufficient; the schoolrooms poorly ventilated; the physical and

sanitary conditions bad and that it finally became necessary to close these schools (Deposition of Ada M. Halderman, record pp. 62-65); that their school equipment was antiquated; the school rooms poorly heated and poorly ventilated, books and equipment entirely inadequate, and the parochial schools were so far beneath the standard, that it was necessary to close them (Deposition of C. M. Metheny, record pp. 67-70). Of course the parochial school system is not on trial in this action, but when the plaintiffs' witnesses testify in the face of such evidence that the parochial schools are the equal of public schools the reliability of such witnesses when they testify as to other things such as property damage is quite questionable.

The supreme court of Nebraska passed over the questions raised by defendants as to the jurisdiction of the district court over the governor and the attorney general when they were not served in the jurisdiction; that courts of equity could not be used to enjoin the enforcement of a criminal statute; that the enforcement of an alleged unconstitutionality could only be enjoined when property rights were threatened, and sustained the validity of legislation under the state and federal constitutions as a reasonable exercise of the police power; further holding that the title to the act was sufficient to cover all provisions of the act (Opinion below, record pp. 82 to 87).

POINTS AND AUTHORITIES.

I.

The Nebraska Foreign Language Statute (Norval Law) was a legitimate exercise of the police power of the state.

Decision below of Supreme Court of Nebraska (pp. 82 to 86 of record), in *Nebr. Dist. Evang. Synod* v. *McKelvie*, (Norval Law case), 187 N. W. 927.

Nebr. Dist. Evang. Synod, etc. v. *McKelvie*, (Siman Law case), 104 Neb. 93.

Meyer v. *State*, (Neb.) 187 N. W. 100.

Freund on Police Power, Sections 143, 479, 264 to 266.

Block v. *Hirsh*, 256 U. S. 135.

Pohl v. *State*, 102 Ohio State 474.

Bartels v. *State*, 191 Iowa 1060.

Muller v. *Oregon*, 208 U. S. 412.

Noble State Bank v. *Haskell*, 219 U. S. 104, 575.

Wenham v. *State*, 65 Neb. 394.

C. B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549.

Halter v. *Neb.* 205 U. S. 34.

McLean v. *Arkansas*, 211 U. S. 539.

Murphy v. *Calif.*, 225 U. S. 623.

Booth v. *Illinois*, 184 U. S. 425.

Wilson v. *New*, (Adamson Law case) 243 U. S. 332.

Second Employers Liability Cases, 223 U. S. 1.

Matter of Gregory, 219 U. S. 216.

Rast v. *Van Deman*, 240 U. S. 342.

Pitney v. *Wash.*, 240 U. S. 387.

Arizona Employers Liability Cases, 250 U. S. 400.

Gilbert v. *Minn.*, 254 U. S. 325.

Barbier v. *Connolly*, 113 U. S. 27.

Mugler v. *Kansas*, 123 U. S. 623.

Holden v. *Hardy*, 169 U. S. 366.

Jacobson v. *Massachusetts*, 197 U. S. 11.

Atkin v. *Kansas*, 191 U. S. 207.

Sleigh v. *Kirkwood*, 237 U. S. 52.

Foreign Language Laws of twenty-one states detailed on pages 25-31 of this brief.

II.

The Nebraska Statute does not curtail the constitutional guarantee of religious liberty.

Nebraska Dist. Evangelical Synod v. *McKelvie*, 104 Neb. 93 and second case, 187 Northwestern 927.

State v. *Meyer*, 187 Northwestern 100.

Davis v. *Beason*, 133 U. S 333.

Matter of Frazee, 63 Mich. 396.

III.

The Nebraska Statute is neither unreasonable nor arbitrary classification.

Evang. Lutheran Synod v. *McKelvie*, 187 N. W. 927.
Halter v. *Neb.* 205 U. S. 34.
Pohl v. *State*, 102 Ohio State 474.
Miller v. *Wilson*, 236 U. S. 373.
C. B. & Q. R. R. Co. v. *McGuire*, 219 U. S. 549.
Lindsley v. *Nat. Carbonic Gas Co.*, 220 U. S. 61.
Johnston v. *Kennecott Copper Corp.*, 248 Fed. 407.
Quong Wong v. *Kirkendale*, 223 U. S. 59.
Lower Vein Coal Co. v. *Industrial Board of Ind.*, 255 U. S. 144.
Hays v. *Mo.*, 120 U. S. 68.
Mo. v. *Lewis*, 101 U. S. 22.
Mogoun v. *Ills. Trust Co.*, 170 U. S. 283.
Paul v. *Virginia*, 8 Wallace 168.
U. S. v. *Wheeler*, 254 U. S. 281.
Lawton v. *Steele*, 152 U. S. 133.
Erie R. R. v. *Williams*, 233 U. S. 685.
Slaughter House cases, 16 Wallace 36.
Tanner v. *Little*, 240 U. S. 369.

IV.

The Nebraska Statute does not violate the constitutional guarantee of personal liberty or private property.

(Cases cited under Point I.)

V.

The State has the right to regulate courses of study in schools.

Berea College v. *Ky.*, 211 U. S. 45.
Andrew v. *Webber*, 108 Ind. 31.
State v. *Bailey*, 157 Ind. 324, 329.
Erie R. R. v. *Williams*, 233 U. S. 685.
German Alliance Ins. Co. v. *Kansas*, 233 U. S. 389.
Mobile County v. *Kimball*, 102 U. S. 691.

ARGUMENT.

I.

The Nebraska Foreign Language Statute (Norval Law) was a legitimate exercise of the police power of the state.

An examination of the statute set forth in full at pages 2-3 of this brief shows that the act forbids the teaching of foreign languages to children of tender years before such children are grounded in the English tongue. The statute does not forbid the use of foreign languages by persons of maturity or prevent the study of foreign languages by persons who had passed the eighth grade. It does not in any way interfere with bona fide religious instruction or with any legitimate religion. It is a regulatory rather than a probihitory act.

The object of the legislation, as it so clearly pointed out by the Nebraska Supreme Court in *Nebraska District* v. *McKelvie*, 104 Neb. 93, and in the second case, 187 Northwestern 927, the decision below (Record pp. 45 to 55), and by the Ohio Supreme Court *(Pohl* v. *Ohio*, 102 Ohio State 497) and by the Iowa Supreme Court *(Bartels* v. *State*, 191 Iowa 1060), was to create an enlightened American citizenship in sympathy with the principles and ideals of this country, and to prevent children reared in America from being trained and educated in foreign languages and foreign ideals before they had an opportunity to learn the English language and observe American ideals. It is a well known fact that the language first learned by a child remains his mother tongue and the language of his heart. The purpose of the statute is to insure that the English language shall be the mother tongue and the language of the heart of children reared in this county who will eventually become citizens of this country.

The statute is a part of a general Americanization program to bring our citizenry towards the belief that the American government, as outlined by Washington, Lincoln, Webster and Jefferson, is one of, by, and for the people; a government

whose just powers are derived from the consent of the people; a true democracy established in a republic; a sovereign nation of forty-eight sovereign states; a perfect union, one and inseparable, established on principles of freedom, equality, justice and humanity, for the foundation and the continuation of which American patriots have and will sacrifice their lives and imperil their fortunes.

These foreign language statutes are no more difficult to sustain under the Police Power than the Bank Guarantee Act, the Workmen's Compensation Act, the Female Labor Laws and the Tenement House Legislation.

As is shown by the decisions above quoted isolated communities exist in Nebraska where foreign languages are used; which communities are under the control of foreign leaders and cannot be reached by American newspapers, or except through the medium of a foreign tongue; these communities are growing up as little Germanys, little Italys and little Hungarys. In them children are being reared in a foreign atmosphere and in and by foreign languages. As long as these conditions continue such communities cannot well be assimilated into our American Republic. It was to obviate this danger to the state that the Nebraska legislature required that the primary education of Nebraska children should be exclusively in English.

Applying the tests laid down as to the legitimate exercise of the police power by Prof. Freund in his excellent treatise on the Police Power (Section 143):

"Does a danger exist?" "Is it of sufficient magnitude?" Any intelligent observer can see it. The legislature so considered it. The Nebraska Supreme Court called particular attention to it in the decision below, in the two cases of *Evangelical Lutheran Synod* v. *McKelvie, the Governor et al.*, 104 Neb. 93 and 187 N. W. 927, and in *Meyer* v. *State*, 187 Northwestern 100.

"Does it concern the public?" The education of the youth, the training for American citizenship, is of vital public concern in a government which depends upon the intelligence of the electorate.

"Does the proposed measure tend to remove it?" The menace of unassimilated social groups differentiated by language will disappear in a generation when all children are first required to master English as their mother tongue. A common language is our greatest assimilator.

"Is the restraint a requirement in proportion to the dangers?" The statute requires only a foundation in English before the study in other languages is attempted. After a child has finished the eighth grade any foreign language may be studied. "English first" is the purpose of the statute.

"Is it possible to secure the object sought without impairing essential rights and principles?" The constitutionality of legislation in respect to hours and wages of railway trainmen was upheld in the Adamson law case, *Wilson* v. *New*, 243 U. S. 332; regulations in respect to the working hours of women in *Muller* v. *Oregon*, 208 U. S. 412; compensation for industrial accidents in *Employers Liability Cases*, 223 U. S. 1; *Arizona Employers Liability Cases*, 250 U. S. 400, and legislation regulating rents in municipalities in *Block* v. *Hirsh*, 256 U. S. 135. If it is within the police power of the state to regulate wages, to legislate respecting housing conditions in crowded cities, to prohibit dark rooms in tenement houses, to compel landlords to place windows in their tenements which will enable their tenants to enjoy the sunshine, it is within the police power of the state to compel every resident of Nebraska to so educate his children that the sunshine of American ideals will permeate the life of the future citizens of this republic. A father has no inalienable constitutional right to rear his children in physical, moral or intellectual gloom. As to all these matters the judgment of the legislature is to be taken as correct unless it appears clearly wrong.

Again in his work on Police Power, Prof. Freund, paragraph 479, says:

> "The state has power to control the education of minors and in doing so may further the interests of nationality, but where minors are not concerned, the pursuit of truth and learning must be absolutely free. These principles are so fully recognized by the practice of legislation that they stand unquestioned even if lacking express judicial confirmation."

And in paragraph 274 the same learned author lays down the proposition that the direction of education of children is certainly not beyond the police power. This is true whether education be carried on in private or public schools.

In upholding the Nebraska Law of 1919 the Supreme Court of Nebraska in the Siman law case, *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie*, 104 Neb. 93, 99, said:

> "The ultimate object and end of the state in thus assuming control of the education of its people is the upbuilding of an intelligent American citizenship, familiar with the principles and ideals upon which this government was founded, to imbue the alien child with the tradition of our past, to give him knowledge of the lives of Washington, Franklin, Adams, Lincoln and other men who lived in accordance with such ideals, and to teach love for his country, and hatred of dictatorship, whether by autocrats, by the proletariat, or by any man or class of men.
>
> "Philosophers long ago pointed out that the safety of a democracy, or republic, rests upon the intelligence and virtue of its citizens. 'The safety of the people is the supreme law.' * * * The state should control the education of its citizens far enough to see that it is given in the language of their country, and to insure that they understand the nature of the government under which they live, and are competent to take part in it. * * * It has been said by the United States Supreme Court in

Gundling v. *Chicago,* 177 U. S. 183, that the courts will not interfere with the operation of a regulative statute, 'unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for federal interference.' *Giozza* v. *Tiernan,* 148 U. S. 657.

"Neither the constitution of the state nor the Fourteenth Amendment takes away the power of the state to enact a law that may fairly be said to protect the lives, liberty and property of its citizens, and to promote their health, morals, education and good order. 'If the state may compel the solvent bank to help pay losses sustained by depositors in insolvent banks, if it may enact workmen's compensation laws in order that the workman shall have no strained relations with his employer, nor become embittered towards society because, though an industry has crippled him, it has paid him nothing, if acts aiming to make better citizens by diminishing the chances of pauperism are sustained, if it is competent for the state to protect the minor from impoverishing himself by contract, it surely is not an arbitrary exercise of the functions of the state to insist' that the fundamental basis of the education of its citizens shall be the knowledge of the language, history and nature of government of the United States, *and to prohibit anything which may interfere with such education.* Laws, the purpose of which are with respect to foreign language speaking children, to give them such training that they may know and understand their privileges, duties, powers and responsibilities as American citizens, which seek to prevent a foreign language from being used as the medium of instruction in other branches, and as the basis of their education are certainly conducive to the public welfare, and are not obnoxious to any provision of either the state or federal constitution."

In touching upon the need for this legislation the Supreme Court of Nebraska in the decision above quoted, at page 97, said:

"The operation of the selective draft law disclosed a condition in the body politic which theretofore had been appreciated to some extent, but the evil consequences of which had not been fully comprehended. It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. *It was also demonstrated that there were local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language.*

"The purpose of the new legislation was to remedy this very apparent need, and by amendment to the school laws make it compulsory that every child in the state should receive its fundamental and primary education in the English language."

It will be noted that this is not the language of enthusiastic, "Chauvanistic" counsel but is a judicial finding of the highest court of the state of actual conditions as existent in the commonwealth of Nebraska before the passage of this foreign language legislation.

In discussing the purpose of the legislation the Supreme Court of Nebraska (*Meyer* v. *State*, 187 Northwestern 100) said:

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence,

naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state."

And in further discussing the present law (the Norval Act of 1921) the Supreme Court of Nebraska in the case of *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 187 Northwestern 927 (Printed record p. 83), said:

"The reasons found by the Legislature for this enactment, we believe are set out in our opinion in *Nebraska District of Evangelical Lutheran Synod* v. *McKelvie,* 104 Neb. 93 and *Meyer* v. *State.* The legislature intended that the English language should become the universal language of the state; that children of foreign parentage should be so reared and educated that English would come to be their natural language and the language which they would continue to use. Children of foreign parentage, first starting to school, are able to talk the language of their parents. That language is at that time the one naturally favored by them. *The requirement that children who have not passed the eighth grade shall in language study apply themselves exclusively to the English language, so that English shall be mastered and become the more favored one, we are not ready to say is a measure more stringent than is warranted, nor that the Legislature has acted without reason and in a purely arbitrary manner. The law does not create an absolute prohibition against the learning of a foreign language. It only postpones and regulates that teaching. There is no curb on knowledge, such children have a sufficient task to master English in what time and opportunity is available to them for language study. When the child becomes sufficiently versed in English, which in the ever*

of the law, is when he has passed the eighth grade, and has received the instruction in English which necessarily goes with that extent of education, when that language has become his language, then he is free to study whatsoever language he pleases. The statute was enacted in a jealous regard to further and assure the universal use of English, and as a means to that end, to curtail, so far as could reasonably be done, the rearing of children of foreign parentage in the language of their parents.
* * *

"It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional as in violation either of the state or of the Federal Constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. It does not interfere with religious liberty nor with the giving of religious instruction."

In sustaining the constitutionality of the Ohio foreign language act, which is substantially the same as that of Nebraska, the Supreme Court of Ohio in *Pohl* v. *State*, 102 Ohio State 474, said:

"While much consideration in arguments and briefs has been given to the wisdom of the provisions of Sections 7762-1 and 7762-2, General Code, this court is of the opinion that such argument might better be addressed to the legislative branch of the government.

"Courts do not sit to review the wisdom of legislative acts, nor do they possess such power. On the contrary, the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively. The inexpediency, injustice or impropriety of a legislative act are not grounds upon which the court may declare the act void. The remedy for such evils must be sought by an appeal to the justice and patriotism of the legislature itself. Except as limited by the Federal and State Constitutions, the power of the general assembly to legislate is inherent and unlimited and covers the whole range of legitimate legislation.

"If the general assembly in the exercise of its power to legislate enacts laws necessary for the welfare of society, and thereby makes unlawful conduct theretofore lawful, such legislation will not be held to be unconstitutional simply because it forbids the doing of things theretofore permitted. The 'enjoying and defending life and liberty * * * and seeking and obtaining happiness' do not contemplate that they shall be enjoyed, sought and obtained as they were enjoyed, sought and obtained by primitive man, but that they shall be enjoyed, sought and obtained with such regard to the rights of society as the common welfare, as defined by the legislature, requires. It is upon this theory that our system of government exists.

"The legislation in question is of equal application to every pupil of the state who has not completed a course of study equivalent to that prescribed in the first seven grades of the elementary schools regardless of nationality, ancestry, or place of birth, and is therefore, of equal operation upon every person within the designated grade.

"The constitutionality of the act under consideration is, therefore, dependent upon whether the common welfare requires such legislation. The legislature is presumed to have had before it such information with reference to the effect of the teaching of the German language to the youth of the state below the eighth grade as justified it in concluding that the common welfare required the prohibition of such teaching to such youth, and if the legislature found such facts to exist as to warrant it in the enactment of the sections in question it is not within the province of a court to redetermine the existence or non-existence of such facts, even though the court might upon such redetermination reach a different conclusion. If under any possible state of facts the sections would be constitutional, this court is bound to presume that such facts exist.

"No principle is better established by the decisions of the federal and state courts than that the possession and enjoyment of all rights are subject to such reasonable regulations as are deemed by the legislative authority to be essential to the welfare of the state, and every intendment is to be made in favor of the validity and law-

fullness of such regulations unless they are clearly unreasonable and violative of some express provision of the constitution.

"For these reasons we are unable to reach the conclusion that Sections 7762-1 and 7762-2 are unconstitutional, and the judgment of the court of appeals will, therefore, be affirmed."

The Supreme Court of Iowa in affirming the conviction of one Bartels who was convicted of the violation of the Iowa foreign language act by teaching reading in German in *State v. Bartels*, 191 Iowa 1060, said:

"The state has a right to adopt a general policy of its own respecting the health, social welfare and education of its citizens, and as long as it does no violation to constitutional inhibitions the citizen within its borders has no other alternative than to obey or remove to a more congenial environment. Iowa has not been backward in enacting legislation under these well recognized powers. Our public health statutes, providing for compulsory quarantine and similar regulations, have been upheld and enforced. A citizen may feel that he has a perfect right to determine for himself whether his child under 16 years of age shall be employed, and the hours and conditions of such service, but, if so, he must acquire residence in some state which has no child labor law similar to ours. So, too, with many other statutes which have been enacted by our General Assembly, and are the settled policy of this state. To all such, the person, native-born or foreigner, who seeks residence within this commonwealth must subscribe. From the earliest days the settled policy of this state has been to foster, encourage and promote the education of its youth. Our great public school system and our state institutions of higher education are the outcome and result of this policy. No one will dispute the power and the right of the state to adopt and carry out such a beneficent policy. * * *

"The policy of the state has been a progressive one, but it has been consistent and in full keeping with its powers to do all these things for the better training and

education of its youth for the full duties and responsibilities of American citizenship. *The advent of the great World War revealed a situation which must have appealed very strongly to the Legislature as justifying the enactment of this statute. Men called to the colors were found to be in some instances not sufficiently familiar with the English language to understand military commands or to read military orders. It was to meet this situation, to encourage the more complete assimilation of all foreigners into our American life, to expedite the full Americanization of all our citizens that the Legislature deemed this statute for the best interests of the state.*

"The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other. * * *

"The policy of the state is apparent, and the evil sought to be remedied is manifest. With the wisdom of the act of the Legislature in passing the statute in question as a means of meeting this situation and seeking to remedy the same we have no concern whatever. That question was wholly for the determination of the General Assembly. They adopted such means as to them seemed wise, appropriate and efficient. * * *

"From an early day it has been the rule of this court that a law will be declared to be unconstitutional only when it is 'clearly, plainly and palpably so.' * * *

"The statute in no manner whatsoever interferes with religious freedom. It is expressly limited to secular subjects. There is scarcely any secular subject taught in our schools that cannot fairly be said to be used in some way in connection with religious instruction or religious belief. It would be going to extreme lengths to say that the regulation of the teaching of such a subject was an interference with religious freedom, because it might be utilized in acquiring religious instruction in some way. Arithmetic, history, writing, geography, all are properly used in religious instruction to some degree. As bearing on this feature of the discussion, see *Owens* v. *State*, 6 Okla Cr. 110, 116 Pac. 345, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218; *Smith* v. *People*, 51 Colo

270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Reynolds* v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244. * * *

"As we have observed, a known evil existed; it was within the power of the Legislature to seek to remedy it by the enactment of this statute. The defendant has a right to engage in the profession of teaching, but in so doing he is subject to such legislative enactments as may be fairly and reasonably said to be for the public welfare. We think this statute was a proper and reasonable exercise of the police power of the state in attempting to prevent an existing evil which the Legislature regarded as inimical to the public welfare. Such being the case, the defendant has not been denied any privileges guaranteed him by the Constitution."

The recognized general necessity for legislation similar to the Nebraska foreign language act, the recognition of the threatened menace and the proper remedy is shown by the fact that twenty-one states besides Nebraska have enacted similar foreign language laws. This language law is not a unique vagary of the Nebraska legislature.

For the convenience of the court, we have incorporated in this brief the legislation of the twenty-one other states:

CALIFORNIA—Section 1664, Political Code:

"All schools must be taught in the English language * * *"

COLORADO—Section 6010, Chapter, 179 of the 1919 Session Laws (Pg. 599):

"Instruction in the common branches of study in the public elementary schools of this state shall be conducted through the medium of the English language only, nor shall any other than the English language be taught as a separate and distinct branch of itself.

"During the time that the public schools of the district in which he is a resident are in session, no child of school age who has not completed the eighth grade shall be permitted to attend any school where the common branches are not taught in the English language."

DELAWARE—Section 11, Chapter 157, Laws of 1919 (Pg. 356) Rev. Code 2283:

> "In every elementary school of and in the state there shall be taught at least reading * * * oral and written English * * English shall be the only language employed and taught in the first six grades of the elementary schools of and in the state, provided in case this provision is violated by individuals, private educational associations, corporations, or institutions, the state board of education shall take such legal action as will enjoin such violation."

INDIANA—Section 1, Chapter 18, Laws of 1919 (Pg. 50):

> "That all subjects and branches taught in the elementary schools of the state of Indiana, and all elementary schools maintained in connection with benevolent or correctional institutions, shall be taught in the English language only, and the trustee * * * shall have taught in them * * * English grammar, * * * Provided, that the German language shall not be taught in any of the elementary schools of this state * * *."

> "All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first eight grades of the elementary schools of this state, shall be taught in the English language only, * * * Provided, that the German language shall not be taught in any such schools within this state."

KANSAS—Chapter 272, Laws of 1919, amending Section 9415, Gen. Stat. 1915:

> "Every parent, guardian, or other person in the state of Kansas having control or charge of any child or children having reached the age of 8 years and under 16 years shall be required to send such child or children to a public school or a private, denominational or parochial school in which all instruction shall be given in the English language only, each school year, for such time as said school is in session."

Chapter 257, Laws of 1919 (Pg. 352):

"All elementary schools in this state, whether public, private or parochial, shall use the English language exclusively as the medium of instruction."

LOUISIANA—Section 1, Act 114, Laws of 1918 (Pg. 188):

"It shall be unlawful for any teacher, professor, lecturer, person or persons employed in the public, private, elementary or high schools, colleges, universities, or other institutions, in the state of Louisiana that in any way form part of the public or private educational system or educational work in the state of Louisiana, to teach the German language to any pupils or class."

Section 1, Act. 177, Laws of 1918 (Pg. 332):

"That any and all persons, firms, partnerships, corporations, and associations or organizations of any and every form and character, all and singular, directly and indirectly, be and are hereby prohibited in this state from * * *; and likewise prohibiting the use or display of any sign, insignia, name, designation, title, phrase, circular, or other form of advertising or description, written, printed, or appearing in the German language or that of any nation allied with Germany, or derived from such language, whether same refers to any article or thing of German origin or not; and likewise prohibiting the sale, exchange, the giving away, distribution, delivering, or in any manner conveying to another or others, or offering or contracting to sell or otherwise dispose of, or to exhibit or display for sale or any other purpose, any book, paper, magazine, or other publication, written or printed or appearing in the German language or the language of any ally of Germany * * *."

MINNESOTA—Section 1, Chapter 320, Session Laws of 1919 (Pg. 337):

"Every child between eight and sixteen years of age shall attend a public school, or a private school, in each year during the entire time the public schools in the district in which the child resides are in session; provided, however, that no child shall be required to attend

public school more than ten (10) months during any calendar year. In districts maintaining terms of unequal length in different public schools, this requirement shall be satisfied by attendance during the shorter term.

"A school, to satisfy the requirements of compulsory attendance, must be one in which all the common branches are taught in the English language, from textbooks written in the English language and taught by teachers qualified to teach in the English language. A foreign language may be taught when such language is an elective or a prescribed subject of the curriculum, but not to exceed one hour in each day."

MONTANA—Section 912, 1 Revised Codes 1917:

"All schools shall be taught in the English language * * *."

NORTH DAKOTA—Chapter 41, Laws of 1918:

"All instruction (in public and private schools) shall be given only and entirely in the English language. It shall be unlawful to teach any subject, except foreign and ancient languages, in any high school, academy, college, or higher institution of learning in this state, or in any private school, academy, college, or institution of higher learning, except foreign and ancient languages and religious subjects, in any but the English language."

OKLAHOMA—Section 1, Chap. 141, Laws of 1919 (Pg. 201):

"That the English language is hereby declared to be the language of the people of the state of Oklahoma. And it shall be unlawful to teach or instruct in any other language in any public, parochial, denominational, or private school or other institution of learning within the state of Oklahoma, except pupils receiving such instruction shall have completed the eight grades of the common school curriculum as designated by the state board of education.

"Sec. 2. All textbooks used in the first eight grades of all said schools shall be printed in the English language. (Penalty, fine, jail.)

SOUTH CAROLINA—Section 5, Chap. 135, Session Laws of 1919 (Pg. 206):

"That any private or parochial school attended by any child between eight and fourteen years of age shall be first approved by the State Board of Education. Such school must give its instruction in the English language, and it must teach such subjects as are required in a similar public school in South Carolina."

SOUTH DAKOTA—Section 1, Chap. 41, Laws of 1918:

"Every person having under his control a child of the age of 8 years and not exceeding the age of 16 years shall annually cause such child to regularly attend some public school, or private day school, for the entire annual term in each year during which the public school in the district in which such person resides is in session, until such child shall have completed the first eight grades of the regular common school course; * * * Provided, further, that all such instruction shall be given only and entirely in the English language."

OHIO—1919 session of the legislature passed the following act:

"Sec. 7762-1. That all subjects and branches taught in the elementary schools of the state of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all branches named in Section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

"Sec. 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state, shall be taught in the English language only, and the person or persons, trus-

tees or officers in control shall cause to be taught in them such branches of learning as prescribed in Section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct provided that the German language shall not be taught below the eighth grade in any such schools within this state."

"Sec. 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense.

"Sec. 7762-4. In case any section or sections of this act shall be held to be unconstitutional by the Supreme Court of Ohio such decision shall not affect the validity of the remaining section."

IOWA—Section 2263, Compiled Code of Iowa:

"The medium of instruction in all secular subjects taught in all of the schools, public and private, within the state of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade."

WASHINGTON—Section 4889 of the 1919 General Statutes:

"All common schools shall be taught in the English language * * *."

Other states having similar laws are:

IDAHO—Page 492 of the 1919 Session Laws.

ILLINOIS—Page 917, 1919 Session Laws.

MASSACHUSETTS—Page 478, Revised Laws of 1902.

NEVADA—Page 247, 1919 Session Laws.

OREGON—Page 34, 1919 Session Laws.

WEST VIRGINIA—Chapter 2, 1919 Session Laws.

In no state has this foreign language legislation been successfully attacked. Except in three states it has been generally accepted. In three states only, Ohio, Iowa and Nebraska, have attempts been made to overthrow it. In every adjudicated case such legislation has been sustained and upheld as against all constitutional objections that astute counsel could formulate.

The Nebraska legislation does not prohibit speaking or writing in foreign languages. There is nothing in it to prohibit the publication of a German newspaper; nothing which would interfere with the legitimate activities of the "Lieder Kranz" or the "Turn Verein." The purpose of the statute is only to insure instruction in English to children before instruction in foreign languages.

The danger to the American Republic from isolated communities using foreign languages and thus rendering themselves immune from the influences of the "Melting Pot" is pointed out by John W. Weeks, Secretary of War in the present cabinet,—the officer specifically charged with the defense of the realm and who from the opportunities of his position is well qualified to speak on the subject. In an article in the August 12, 1921, edition of the American Legion Weekly on page 4 the Secretary states:

> *"Ignorance of the English language, of American ideals and the history of our country and its form of government, is America's most powerful enemy."*

The population of Nebraska as shown by the 1910 census was 1,182,214. Nearly one-half of our population, 539,014, are either foreign born or born of one or more foreign parents, 176,662 being foreign born and 362,352 being of foreign parentage. The illiterates of ten years and over number 18,009. The illiterates of native parentage number 2,787, and those of

foreign born or mixed parentage total 13,755 (these figures are taken from the World Almanac, 1921 Edition) . Secretary of War Weeks in the article previously referred to states that 24.09 per cent of the men examined for the draft army were unable to read American newspapers or to read an English letter. A moment's reflection on these figures impresses anyone with the menace to the state that exists from the presence in our midst of such a large number of persons who cannot read or write English and are immune to Americanization influences. We all realized it during the war. Our government is based upon the intelligence of the electorate and cannot successfully exist with an ignorant population. All this was keenly appreciated by the Nebraska legislature, and with this situation in mind the legislation was enacted.

In their comparison on page 47 of plaintiffs' brief between the Nebraska legislation and the attempt of Germany to force Poland to use the German language, and the attempt of Russia to forbid the use of Polish in Russian Poland, plaintiffs' counsel fail to appreciate the difference between requiring those who seek asylum in America to use the language of the country and between attempting to impose by force of arms a foreign language upon a conquered people in their own country. Of course, the latter is tyrannical, just as the former is merely self-protection.

The following principles and their application in respect to the police power may be gleaned from recent decisions of the Supreme Court of the United States. It will be noted that the latter decisions extend the police power to many occupations and situations to which the earlier decisions did not.

The police power itself is an attribute of sovereignty. It exists without any reservation in the Constitution. It is founded on the right of the state to protect its citizens, to provide for their welfare and progress and to insure the good

order of society. It corresponds to the right of self preservation in the individual. Its application varies with the exigencies of the situation and with the progress of mankind. It is the foundation of our social system. Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. It extends to the protection of life, health, comfort and welfare of persons and also to property, and to the welfare of the state itself. All natural persons within the jurisdiction hold their property and pursue their various callings subject to the police power. It is inherent in the various states of the Union, as well as in the Federal government. To the extent that property or business is devoted to public use or is affected with a public interest it is governed by the police power. It extends to regulation of education as the very existence of our government, as well as its progress and development, depends upon the intelligence of our citizenry.

In the case of *McLean* v. *Arkansas*, 211 U. S. 539, the Supreme Court of the United States, in upholding a statute of Arkansas providing that in coal mines the miners' output must be weighed before it was screened as against the objection thatit was not a proper exercise of the police power, that it was an abridgement of the freedom of contract, and that it was an unjust discrimination against persons engaged in the mining industry, the court said:

> "But in many cases in this court the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract.
>
> "It is then the established doctrine of this court that liberty of contract is not universal, and is subject to

restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. * * *

"The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Atkin* v. *Kansas*, 191 U. S. 207."

In *Sligh* v. *Kirkwood*, 237 U. S. 52, this court held that as the raising and marketing of citrus fruit is one of the principle industries of Florida, that special legislation relating to the export of low grade fruit should be upheld as within the police power as such legislation was desirable for the public welfare to protect the reputation of the state in the fruit trade. In this case the court promulgates a broad definition of the police power, as follows:

"The police power in its broadest sense, includes all legislation and almost every function of civil government. *Barbier* v. *Connolly*, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. *Camfield* v. *United States*, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. *Chicago etc. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject it was said: 'Whether it is a valid exercise of the police power is a question in the case, and that power we have defined as far as it is capable of being defined by general words a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals and safety,

but to those which promote the public convenience or the general prosperity' * * * And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of the government.' *Euband* v. *Richmond*, 226 U. S. 137."

In *Muller* v. *Oregon*, 208 U. S. 412, a noteworthy case in which Justice Brandeis was counsel, a statute of Oregon limiting the hours of labor of female employees in certain industries was upheld as within the Fourteenth Amendment to the Constitution of the United States, on the ground that the physical structure and maternal functions of woman placed her at an industrial disadvantage. As healthy mothers were deemed essential to the production of vigorous offspring, the physical well-being of women became an object of public interest and care. In order to preserve the strength and vigor of the race her hours of labor could be limited by the legislature. It was within the province of the state to protect her from the greed of an employer as well as from promiscuous lust.

In *Holden* v. *Hardy*, 169 U. S. 366, an eight-hour labor law applying to the mining industry was held constitutional. In *Jacobson* v. *Massachusetts*, 197 U. S. 11, a law requiring vaccination against smallpox was upheld. In *Atkin* v. *Kansas*, 191 U. S. 207, a statute of Kansas prescribing the maximum day of labor at eight hours for those employed on public works, was upheld.

In *Murphy* v. *California*, 225 U. S. 623, this court upheld as within the police power an ordinance of a California municipality which prohibited the maintenance of billiard rooms within municipal limits except in connection with hotels. It was said that the Fourteenth Amendment to the Federal Constitution was never intended to protect billiard-hall proprietors in their occupation as against the exercise of the police power of the city, the court saying:

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but does not prevent legislation intended to regulate useful occupa-

> tions, which because of their nature and location, may prove injurious or offensive to the public."

The court in short order and with a mere statement that there was no merit therein disposed of the contention that the ordinance amounted to a denial of equal protection of the law because it permitted hotels to retain billiard tables.

In *Booth* v. *Illinois*, 184 U. S. 425, an Illinois statute against dealing in grain futures was upheld on the theory that courts had nothing to do with the policy of legislation. The rule as to the protection provided by the Fourteenth Amendment to the Federal Constitution was stated as follows:

> "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law. *Mugler* v. *Kansas*, 123 U. S. 623; *Minnesota* v. *Barber*, 136 U. S. 313, 320; *Brimmer* v. *Rebman*, 138 U. S. 78; *Voight* v. *Wright*, 141 U. S. 62."

In the *Second Employers' Liability Cases*, 223 U. S. 1, this court held that congress, by virtue of its constitutional power to regulate interstate commerce, could enact a transportation employees' liability act providing compensation to all injured in the course of employment without regard to the negligence of the employer or a fellow servant and thus could change existing rules regarding liability for injuries and freedom of contract, and could thus supersede existing state legislation on these subjects.

In *Noble State Bank* v. *Haskell*, 219 U. S. 104, in upholding the constitutionality of a state bank guaranty law, the

court said in respect to the alleged conflict between the police power and the guaranty act:

"In answering that question we must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights. They more or less limit the liberty of the individual or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law-making power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund so as to be entitled to a return of what remained of it if the purpose were given up (see *Receiver of Danby* v. *State Treasurer*, 3 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark* v. *Nash*, 198 U. S. 361; *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531; *Offield* v. *New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372; *Bacon* v. *Walker*, 204 U. S. 311, 315.

"It may be said in a general way that the police power extends to all the great public needs. *Canfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be great-

ly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment of checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.

"The question that we have decided is not much helped by the propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not answered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the States may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above described co-operation are necessary safeguards, this court certainly cannot say that it is wrong. *North Dakota* v. *Woodmanse*, 1 N. Dak. 246; *Brady* v. *Mattern*, 125 Iowa 158; *Weed* v. *Bergh*, 141 Wis. 569; *Commonwealth* v. *Vrooman*, 164 Pa. 306; *Myers* v. *Irwin*, 2 S. & R. 368; *Myers* v. *Manhattan Bank*, 20 Ohio 283, 302; *Attorney General* v. *Utica Insurance Co.*, 2 Johns. Ch. 371, 377."

In denying a motion for a rehearing in *Noble State Bank* v. *Haskell*, 219 U. S. 575, the court said:

"We fully understand the practical importance of the question and a very powerful argument that can be made

against the wisdom of the legislature, *but on that point we have nothing to say as it is not our concern.*"

In *Arizona Employers' Liability Cases*, 250 U. S. 400, this court upheld the Arizona employers' liability law as a police regulation as against the constitutional objections that it contravened the Fourteenth Amendment, deprived an employer of his property without due process of law, denied him equal protection of the law and interfered with the workman's constitutional rights of life, liberty and property.

In *Gilbert* v. *Minnesota*, 254 U. S. 325, this court upheld a statute of the state of Minnesota making it a misdemeanor to discourage military service by public speech, as within the police power of the state and as not transgressing the constitutional liberty of free speech, and in respect to the argument that defendant had a constitutional right to freedom of speech, said that it would be a travesty on the constitutional privilege he invokes to assign him its protection under the circumstances of this case.

In the Adamson law cases, *Wilson* v. *New*, 243 U. S. 332, the constitutionality of the Adamson Law fixing eight hours as a standard day for railway trainmen for the basis of pay, except on electric roads and on roads less than one hundred miles long, was upheld by this court as against the objections that:

(1) Congress had no power to legislate as to wages in transportation industries.

(2) That there was illegal discrimination in exempting roads operated by electricity, and short line railroads from the provisions of the act.

(3) That the eight-hour day regulation as a basis of pay was arbitrary.

The court held that the legislation was reasonable and desirable in the face of the emergency presented by the threat of a general strike.

Certainly, if the hours of labor in the mining industry can be regulated; if congress may fix an eight-hour day as a basis of pay in transportation industries; if it can compel solvent banks to pay the losses occasioned by the operation of insolvent banks; if it can forbid the keeping of billiard tables within the municipal limits; if it can compel universal vaccination against smallpox; if it can legislate concerning the hours a man or woman is permitted to work, if the marketing of citrus fruits is of sufficient importance to the state of Florida to merit and sustain special police power legislation to aid the industry, then surely the police power is ample to permit a state to so regulate the education of its children that they may speak the language of the country and that the citizenry of the state may be therefore improved. The Legislature of Nebraska should not be handicapped in its reasonable effort to prohibit a menace not only to the public welfare but to the safety of the state itself.

In the recent case of *Block* v. *Hirsh*, 256 U. S. 135, a rent law giving the tenant the right to occupy any hotel, apartment, or rental property, notwithstanding the expiration of his lease, so long as he paid the rent originally prescribed in the lease, was upheld by this court in the following language:

> "These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if, to answer one need, the legislature may limit height, to another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."

II.

The Nebraska Statute does not curtail the constitutional guarantee of religious liberty.

Plaintiffs in their assignments of error (Record pp. 91 and 92) assert that the Nebraska statute interfered with the mode of public worship of the plaintiffs (Assignment 9); that it interfered with plaintiffs' right of conscience (Assignment 10), and that it contravened the provisions of the Nebraska Enabling Act passed by Congres April 19, 1864, specifying the conditions upon which Nebraska was admitted to statehood:

Section 4 of said Enabling Act reads as follows:

> "* * * And provided further, that said constitution shall provide by an article forever irrevocable, without the consent of the Congress of the United States. * * * Second: That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

Nebraska has complied with the conditions of this Act admitting her to statehood by the enactment of Section 4, Article I of the Constitution of Nebraska, reading as follows:

> "All persons have a natural and indefeasible right to worship Almighty God, according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, moralits and knowledge, however, being essentiol to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction."

It is submitted that no portion of the Nebraska statute interferes with bona fide religious exercises. It does not prohibit the use of foreign languages in religious services. It neither prevents the employment of Latin by the Catholics in the cathedral nor of Hebrew by the Jews in the synagogue. "The so-called ancient or dead languages, not being, strictly speaking, foreign languages, obviously do not come within the spirit or the purpose of the act" (Opinion of Supreme Court of Nebraska in *Nebr. Dist. Evan. Lutheran Synod* v. *McKelvie*, p. 83 of printed record, 187 Northwestern 927). The question is a political rather than a religious one. Plaintiffs' effort is to establish a field for foreign political propaganda rather than for religious work.

As appears from the historical anecdote recited by Wells in his Outlines of History, page 919:

> "One of the most popular songs in Germany during the period following the closing of the Napolonic wars declared that the German Fatherland existed wherever the German tongue was spoken."

Mr. Wells speaking from the viewpoint of a historian declares:

> "It is extraordinarily inconvenient to administer together the affairs of people speaking different languages and so reading different literatures, and having different general ideas. Only some strong mutual interest, such as the common defensive needs of the Swiss mountaineers can justify a close linking of people of dissimilar langauges." (Wells Outlines of History, p. 917).

The Constitution of the United States (first amendment) provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

It will be noted that the federal constitution only contains a limitation on the powers of Congress.

It will be noted that section 3 of the Nebraska statute specifically permits the use of foreign languages in the giving of religious instruction on Sunday. An attempt is made to justify the employment of foreign languages on the ground that their use is necessary in plaintiffs' religion. In this argument the plaintiffs fail to distinguish between religion and mere forms of worship.

The early settlers, who came to America seeking religious liberty did not come for the purpose of worshiping God in a tongue foreign to the land to or from which they migrated. The religious liberty sought by our forefathers, the boon for which they endured the hardships and perils incident to the settlement of a new continent was the right to worship according to the dictates of their own consicences. It was the preservation of this right of freedom of conscience, which our national and state constitutions have guaranteed. There is no guarantee of an inalienable right to use any language one chooses and no granting of a right to perpetuate alien ideals under the guise of religion.

Religion may be defined as a belief in an invisible, superhuman power, a system of faith, doctrine and worship; a loving obedience and service to God as a Heavenly Father and to our fellowmen.

Religion is not a matter of language or geography, but only of individual belief. It matters little whether the Sermon on the Mount was written in Greek or Latin; the beauty of its doctine remains the same independent of language and independent of the mode of expression. The wisdom expressed in the Proverbs of Solomon is not affected by the fact that they were written in the ancient Hebrew. They are just as efficacious when translated into English, German or French. The Ten Commandments are excellent rules of conduct whether given in Greek or Latin. Who knows or cares whether "Theses" of Martin Luther, affixed to the church at Wittenberg were composed in German or Latin. It will always exist as an immortal document.

The only religion that requires a special language for its doctrines is the "Me und Gott" doctrine once promulgated by the Hohenzollerns.

The point is that the plaintiffs in their endeavor to foist the German language upon immature children have attempted to do so under the prextext of religious teaching, when their main purpose has been to promote the German language rather than religious precepts. The German language is no more a necessary part of plaintiffs' Evangelical Lutheran religion than was polygamy a necessary doctrine of the Mormon Church. There is no question that the state has a right, under its police power, to curb licentiousness existing as a doctrine of polygamy under the rules of the Mormon Church, and there is no question but that the state has the right to prohibit the ingrafting of German ideals upon young American children through the guise of religious instruction.

Religion, as well as art and science, remains the same whether discussed in French or English. It is immaterial whether we term the Supreme Being "Jehovah," "God," or "Allah." We can worship him just the same under any name.

We confess we are unable to appreciate "Deutchland Ueber Alles" when translated into any other language, but we lose nothing from Goethe's "Faust" or Hugo's "Les Miserables" when translated into English. The beautiful supplication commencing "Our Father Who Art in Heaven" is as efficacious when rendered by a supplicant in Nebraska in the form of the Lord's Prayer as when rendered by a worshipper at St. Peter's in the form of the Paternoster. Religion is a matter of faith, not of language. We venture to assert that every doctrine of plaintiffs' church can be expressed as well in English as in German. Plaintiffs would be advancing the great work of Americanization if they would use English as their method of expression and instruction, and so educate their parishioners rather than attempt

to block the Americanization program by adherence to foreign tongues.

Plaintiffs' witnesses testified that about 10% of their parishioners, the older element, did not understand sufficient English to enable them to participate in religious services conducted in English. They now urge the necessity of teaching the 90% German so that church services may be conducted in that language. If plaintiffs are permitted to follow this policy, the use of German will be perpetuated and they never will learn English. The statute does not prohibit the teaching of German to persons of mature years. Its function is to prevent a child before he reaches the age of choice or discretion being innoculated with German. The testimony is that even the 10% who cannot appreciate religious English have sufficient knowledge of business English to handle their own affairs (Testimony of Reverend Erk, record pp. 32, 33; Reverend Brommer, record pp. 43-45). If more English were used in the church this difficulty would not exist. Plaintiffs' parishioners can learn religious English just as they have mastered business English. What is needed is more English in the church rather than more German in the schools.

That the religious element is needlessly injected into this litigation is pointed out by the Nebraska Supreme Court decision in *State* v. *Meyer*, 187 Northwestern 100:

> "A thorough knowledge of the German language as would be gained by young children by a course of study in the schools would no doubt, as pointed out in the testimony, make more convenient the matter of religious worship with their parents, whose knowledge of English was limited; but is such a reason sufficient to override the salutary effect and purpose of the statute? If a foreign language can be taught to children of tender years, for the purpose of allowing them to worship in that language, under the guise that such instruction is religious teaching, then the statute is a nullity. Writing, reading, geography and a variety of other subjects could as well be called religious subjects whenever the purpose

was declared to be to use the knowledge, thus attained, as an aid in religious worship.

"Though the statute prohibits the study of the German language and may, to an extent, limit the younger children from as freely engaging in religious services conducted in the German language, as otherwise might be the case, we cannot say that such restriction is unwarranted. The law in no way attempts to restrict religious teachings, nor to mold beliefs, nor interfere with the entire freedom of religious worship.

"Whenever the actions of individuals, even though in pursuance of religious beliefs—in this case the teaching in the schools of the German language to children of tender years—are considered as not in harmony with the public welfare, then it is proper that those acts be curbed.

"As said by Chief Justice Campbell in *In re Frazee*, 63 Mich. 396, 405: 'We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action so as to interfere with that of his neighbors, or violate peace and good order. The whole criminal law might be practically superseded if, under pretext of liberty of conscience, the commission of crime is made a religious dogma. It is a fundamental condition of all liberty, and necessary to civil society, that all men must exercise their rights in harmony, and must yield to such restrictions as are necessary to produce that result.'

"Though every individual is at liberty to adopt and follow with entire freedom whatsoever religious beliefs appeal to him, that does not mean that he will be protected in every act which he does which is consistent with those beliefs, for when his acts either disturb the public peace, or corrupt the public morals, or otherwise become inimical to the public welfare of the state, the law may prohibit them, though they are done in pursuance of and in conformity with the religious scruples of the offending individual. 12 C. J. 944, Sec. 453, *McDowell* v. *Board of Education*, 172 N. Y. Supp. 590; *State* v. *Neitzel*, 69 Wash. 567, 43 L. R. A. (N. S.) 203; *Reynolds* v. *United*

States, 98 U. S. 145; *People* v. *Ashley*, 172 N. Y. Supp. 282; *Smith* v. *People*, 51 Colo. 270, 117 Pac. 612, 36 L. R. A. (N. S.) 158; *Owens* v. *State*, 6 Okla, Cr. Rep. 110, 116 Pac. 345.

"The statute, therefore, which prohibits the teaching of the German language in a parochial school, does not unlawfully interfere with the right of religious freedom in the school or the incidental right to freely give religious instruction, as guaranteed by the Constitution."

And in *Nebraska District etc.* v. *McKelvie*, 187 Northwestern 927, the Nebraska court said in speaking of this language law:

"It appears to us that the law is a reasonable exercise of the police power and is not unconstitutional, as in violation either of the state or of the federal constitution. In its operation it does not deprive any person of life, liberty or property without due process of law, nor does it deny the equal protection of the law. *It does not interfere with religious liberty nor with the giving of religious instruction.*"

The distinction between religion and forms of worship is admirably discussed by Mr. Justice Field in *Davis* v. *Beason*, 133 U. S. 333. The laws of Idaho excluded a polygamist from the exercise of the elective franchise. Davis (a polygamist) was convicted of the violation of this statute and sought refuge as an adherent of the Mormon religion under the constitutional prohibition against interference with religion, claiming that he was indulging in polygamy in obedience to the mandates of his church. In affirming this conviction and disposing of the constitutional objections and pointing out that while freedom of worship according to conscience is guaranteed by the constitution, this guarantee does not permit persons to worship in any manner they may see fit and does not protect forms of worship, the court said:

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. It is often confounded with the

> cultus or form of worship of a particular sect, but is distinguishable from the latter."

And in speaking of the constitutional protection of religion said:

> "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society designed to secure its peace and prosperity, and the morals of its people are not interfered with. However, free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

In the *Matter of Frazee,* 63 Mich. 396, in holding that Salvation Army street parades were subject to municipal traffic regulations, the Supreme Court of Michigan said:

> "We cannot accede to the suggestion that religious liberty includes the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system. There is no legal authority to constrain belief, but no one can lawfully stretch his own liberty of action, so as to interfere with that of his neighbors or violate peace and good order. *The whole criminal law might be practically superceded if under pretext of liberty of conscience, the commission of crime is made a religious dogma.*"

The use of the Polish or the German language is not at all essential to plaintiffs' religion although they may prefer to employ it in their manner and method of worship. The aim of the plaintiffs is the initial instruction of the child in German, so that in the language of the plaintiffs' witness, the Rev. Henry Erk (Record, p. 25, Q. 35), the German language may become the language of the heart. The religious necessity of the use of German is merely a cloak to cover the

effort to make German rather than English the language of the heart. Perhaps 10% of the plaintiffs' parishioners do not have sufficient knowledge of the English language to comprehend religious exercises, but instead of teaching English to the 10% the plaintiffs claim the constitutional right to teach German to the 90%. If plaintiffs were permitted to do this German would be perpetuated rather than displaced.

III.

The Nebraska Foreign Language Statute (Norval Law) is neither an unreasonable nor arbitrary classification.

The plaintiffs argue (brief of plaintiffs in error, p. 25) that the statute is an arbitrary and unreasonable classification, because it prevents persons in Nebraska, who talk in foreign tongues from having their children instructed in foreign languages, and prevents them from hiring tutors to give religious instruction to their children in foreign languages. An examination of the statute shows that the prohibitions contained therein only apply to public, private, denominational and parochial schools and only apply (with the exception of the discrimination section, which is not argued by plaintiff) to children who have not passed the eighth grade. There is nothing in the statute which prohibits a parent from employing a tutor to teach his children German, Polish or any other language. The act merely applies to aggregations of children in schools.

The plaintiffs' argument is based on the theory that somewhere there exists an inalienable personal right to propagate the German language and other foreign languages in America. There is no such right. The statute is general in its application. This point is well handled by the decision of the Supreme Court of Nebraska in the following language (Record p. 84):

> "It is claimed that the law is discriminative. It applies, however, to all schools generally. It covers all of the schools, where, it is well known, children now receive their education. It operates equally upon all children

who have not had an eighth grade education and a knowledge of English which will be consequent therefrom. *Private instruction by a hired tutor, whether within or without the scope of the law, is instruction which is negligible in its extent.* In either event, the law operates in that matter without discrimination. The use and resulting knowledge of a foreign language in the home is not restricted, nor is instruction there prohibited. The exception of Sabbath schools from the law has been placed there with the evident purpose of preventing interference with religious exercises. It is not essential to the validity of the law that it should be a complete and absolute prohibition against the teaching of foreign languages. It was not intended to be such. The law is a regulation of such teaching, and not a prohibition. The qualifications made are not without reasonable basis, and cannot be said to be purely arbitrary."

The condition for which remedy was sought by the Nebraska legislation arose from the teaching of foreign languages to young children in parochial schools before such children had mastered English. The result of teaching German as the mother tongue to a lad born in America proved to be bad. The legislature guarded against it in the statute which it enacted under the police power.

The Supreme Court of the United States in many cases has held that a legislature was vested with considerable discretion in classifying occupations to which regulatory legislation could be applied.

In *Miller* v. *Wilson*, 236 U. S. 373, the following language was used by Mr. Justice Hughes in passing upon a California statute prohibiting employment of women in certain specified industries more than eight hours per day attacked as an arbitrary invasion of personal rights contrary to the Fourteenth Amendment:

"We are thus brought to the objections to the act which are urged upon the ground of unreasonable discrimination. These are (1) the exception of women employed in 'harvesting, curing, canning or drying of any variety of perishable fruit or vegetable,' (2) the omission of those

employed in boarding houses, lodging houses, etc., (3) the omission of several classes of women employes, as for example stenographers, clerks and assistants employed by the professional classes, and domestic servants, and (4) that the classification is based on the nature of the employer's business and not upon the character of the employe's work.

"With respect to the last of these objections, it is sufficient to say that the character of the work may largely depend upon the nature and incidents of the business in connection with which the work is done. The legislature is not debarred from classifying according to general conditions; otherwise, there could be no legislative power to classify. *For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class.* A classification based simply on a general description of work would almost certainly bring within the class a host of individual instances exhibiting very wide differences. It is impossible to deny to the legislature the authority to take account of these differences and to do this according to practical groupings in which, while certain individual distinctions may still exist, the group selected will as a whole fairly present a class in itself. Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one considered in its general application, the classification is not to be condemned. (See *Louisville & Nashville R. R.* v. *Melton,* 218 U. S. 36, 53, 54.) * * * The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulations, to extend it to all cases which it might possibly reach. *Dealing with practical exigencies, the legislature may be guided by experience. Patzone* v. *Pennsylvania,* 232 U. S. 138, 144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not

necessary that the prohibition 'should be couched in all-embracing terms.' *Caroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, 411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227."

In *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, the court said:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.

"2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.

"3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

"4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Batchel* v. *Wilson*, 204 U. S. 36, and other cases."

See *Johnston* v. *Kennecott Copper Corp.*, 248 Fed. 407, (Circuit Court of Appeals, Ninth Circuit) upholding legislation in respect to mining concerns employing five or more persons as against the charge that this was unlawful discrimination and classification.

In *Halter* v. *Nebraska*, 205 U. S. 34, Nebraska legislation prohibited the printing of any advertisement upon the American flag and the use of the flag as an advertising medium was sustained. Many excellent expressions illus-

trative of the police power are used in the decision. One of the arguments against the validity of the legislation was that the statute expressly permitted the use of the flag on magazines. The court disposed of this objection in a summary manner, holding there was no illegal discrimination and no unlawful classification and that the exemption of magazines from the general prohibition against promiscuous use of the flag for advertising purposes rested upon reasonable grounds.

In *Quong Wong* v. *Kirkendall*, 223 U. S. 59, a law imposing a tax on hand laundries not employing women was upheld as against the argument that it was intended as an unlawful discrimination against Chinese laundries. In discussing the legislative power of the state this court said at page 62:

> "It may make discriminations, if founded on distinctions that we cannot pronounce unreasonable and purely arbitrary, as was illustrated in *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Williams* v. *Fears*, 179 U. S. 270; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 469. * * * The criminal law is a whole body of policy on which states may and do differ."

The case further held that a state may carry out a policy with the wisdom of which this court may disagree.

Other cases holding that a state may exercise reasonable discretion in classifying occupations which are regulated or prohibited, are

Wilson v. *New*, 243 U. S. 332.
Pitney v. *Washington*, 240 U. S. 387.
Tanner v. *Little*, 240 U. S. 369.
McLean v. *Arkansas*, 211 U. S. 539.
Murphy v. *California*, 225 U. S. 623.
Lower Vein Coal Co. v. *Industrial Board of Indiana*, 255 U. S. 144.

The excerpt from *Yick Wo* v. *Hopkins*, 118 U. S. 356, quoted on pages 25, 26 and 27 of plaintiffs' brief as well as other isolated extracts from other Supreme Court opinions likewise quoted in plaintiffs' brief are of little benefit in the solution of the problem before the court. We are not so much concerned in what the court says or with the language used in an opinion as we are in the decision itself, in what the court does, and it is desirable in respect to those cases cited by plaintiffs to examine the facts and see what the decision really was. In *Yick Wo* v. *Hopkins*, *supra*, an ordinance of the city of San Francisco, which prohibited the conduct of a laundry business in the city limits without a permit from the municipal authorities, the granting of which was not based upon compliance with conditions but rested in the arbitrary will of the supervisors, and which the facts show was used for the sole purpose of discriminating against Chinamen, was held unconstitutional as depriving a person of equal protection of the laws.

The distinction between this case and *Barbier* v. *Connolly*, 113 U. S. 27, is that in the Yick Wo case the ordinance conferred arbitrary power upon the supervisors to give or withhold laundry permits without regard to the competency of the applicant, the proposed location of his laundry, fire hazard, or upon any reasonable classification. The evidence showed that such an ordinance was an arbitrary and unjust discrimination founded on a difference in race between persons who otherwise were in similar circumstances, and the court held it to be contrary to the protection of the Fourteenth Amendment, which guaranteed all rights without regard to the race, color or nationality.

There is no arbitrary, personal or racial distinction in the Nebraska Foreign Language Statute. The Act applies to all who attempt to ground Nebraska children in foreign languages before they have learned English. In its general application the Nebraska statute more nearly corresponds to the ordinance in *Barbier* v. *Connolly*, 113 U. S. 27, and the law in

Lower Vein Coal Co. v. *Ind. Board of Ind.*, 255 U. S. 144, than it does to the ordinance in the Yick Wo case. The prohibition in the Nebraska statute is based upon known evils and past experience and not on a racial classification of persons. We have provisions for universal suffrage in America, but this does not prevent legislation confining the right of suffrage to persons twenty-one years of age or over. Every person may have a right to study any language, but this does not prevent legislation requiring a person to be grounded in English, to have passed an eighth grade examination, before he is permitted to receive instruction in schools in foreign languages.

We have no quarrel with the decision of *Traux* v. *Raich*, 239 U. S. 33, or *Traux* v. *Corrigan*, 66 L. Ed. 133, set forth on pages 27, 28 and 29 of plaintiffs' brief. In *Traux* v. *Raich*, *supra*, this court considered an Arizona statute, which prohibited the employment of more than 20% alien laborers by persons, companies or corporations doing business in Arizona. The holding was that the Fourteenth Amendment applied to any person within the jurisdiction and consequently to aliens; that the Arizona statute arbitrarily deprived many aliens of their right to work: that this is a distinction based upon nationality; that the control of immigration was vested in the federal government, and that a state court cannot assume control of immigration by passing an act forbidding an alien to work, and consequently compelling him to move and starve. Of course, that Arizona statute contravened the Fourteenth Amendment. The Nebraska Foreign Language Act is not based upon any difference in race, color or previous conditional servitude, but was based upon its existence of and enacted to remedy a known and recognized evil.

In *Traux* v. *Corrigan*, *supra*, this court held, although four judges dissented, that an Arizona statute, which denied an employee equitable relief from unlawful picketing deprived such employer of property without due process of law, and denied him equal protection of law. The case is based on

the protection of property rights. There are no property rights involved in the case at bar.

In *Hayes* v. *Missouri*, 120 U. S. 68, quoted on page 30 of plaintiffs' brief, a Missouri statute giving the state fifteen challenges in criminal cases arising in cities of 100,000 population and only eight in cases in other places was held a reasonable classification and not unconstitutional. The court held that the constitutional guarantee of a trial by an impartial jury was not infringed, saying:

> "The number of challenges must necessarily depend upon the discretion of the legislature and vary according to the conditions of different communities and the difficulties in them of securing intelligent and impartial jurors. The whole matter is under its control."

Large cities contain such a mixed population, urban business men are so prone to escape jury service, that giving the state fifteen challenges seems a wise precaution.

In *Missouri* v. *Lewis*, 101 U. S. 22, cited on page 31 of plaintiffs' brief, Missouri legislation provided for an appeal only to the St. Louis Court of Appeals in cases arising from the city of St. Louis, while appeals to the Supreme Court of Missouri were permitted in other cases, was held not to abridge any rights guaranteed under the Fourteenth Amendment.

In *Magoun* v. *Ill. Trust & Savings Bank*, 170 U. S. 283, cited on page 31 of plaintiffs' brief, an Illinois inheritance tax levying different amounts on different degrees of relationship was held to be a classification, which the legislature had power to make and which did not conflict with the federal constitutional provisions.

A reasonable classification is permitted without doing violence to the constitutional provisions as to equal protection of the law. Such classification must be based upon a real and substantial distinction bearing a reasonable and just relation in respect to the purposes of legislation. The classification in the Nebraska statute rests upon the passage of the

eighth grade examination. The legislature realized that it was a menace to the state to have children growing up within its borders thinking of German as the language of their heart and as their mother tongue. It determined that all children should be grounded in English before taking up foreign languages and fixed the eighth grade as a reasonable point where the study of foreign languages could be commenced without danger to the state. The plaintiffs' theory of an inalienable constitutional, guaranteed right to not only talk German, but to spread it, propagate it, educate children in it and make it the language of the heart has no support in any adjudicated cases. Nowhere is it defined as a privilege or an immunity guaranteed to American citizens.

IV.

The Nebraska Foreign Language Statute does not unlawfully interfere with property rights or personal liberty.

It is urged that the right to pursue a legitimate vocation is within the rights guaranteed by the Fourteenth Amendment, that the teaching of German is a legitimate occupation and is likewise guaranteed (brief of plaintiff in error, p. 20).

The liberty guaranteed to the individual by the Fourteenth Amendment is not the liberty enjoyed by primitive man. Personal liberty in the present stage of civilization is always subordinate to the public good. Doubtless the occupation of a foreign language teacher is somewhat interfered with. The enactment of prohibitory legislation seriously handicapped many bar-tenders. Until the passage of regulatory statutes making it unlawful one could legally sell cigarettes to minors. Before the enactment of forgery statutes one could alter bank paper at his pleasure. But these rights were not guaranteed to the individual in perpetuity. With the enactment of the prohibition laws we all lost our right to transport and vend intoxicants. Prohibition laws do not violate the Fourteenth Amendment because they affect the property value of a brewery. *Mugler* v. *Kan-*

sas, 123 U. S. 623. Regulatory legislation, upheld by our courts has made all these things criminal. At one time the receipt of rebates led to the establishment of the greatest fortune in America, now their acceptance would lead to the penitentiary. One has no inalienable right to sell liquor or tobacco, receive rebates, run an automobile at high speed or carry a pistol. As society progresses and sets a higher standard many acts become unlawful which were previously legitimate. The occupation of a foreign language teacher was and still is a legitimate one. Such method of livelihood is not seriously impaired by the Nebraska legislation. In the future a teacher is confined in the exercise of his talents to children who have passed the eighth grade, just as tobacco dealers must confine their sales to persons who have attained their majority.

Prior to the female labor acts a woman could work as many hours as she desired, to the detriment of her health, but it has been held that a curtailment of her liberty to work was not a violation of the Fourteenth Amendment.

Wenham v. *State,* 65 Neb. 395.

Muller v. *Oregon,* 208 U. S. 412.

Ordinarily, conducting a laundry is a legitimate occupation, but the prohibition of laundry work within certain territorial limits in San Francisco between 10 A. M. and 6 P. M. was construed to be a police regulation not prohibited by the Fourteenth Amendment.

Barbier v. *Connolly,* 113 U. S. 27.

That case is so instructive on the question of discrimination and personal liberty that we set forth the following excerpts from it:

> "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and

security should be given to all under like circumstances in the enjoyment of their personal and civil rights, that all persons should be entitled to pursue their happiness and acquire and enjoy property, that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts, that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances, that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

The right to choose or pursue a legitimate vocation is within the constitutional guarantee but the state has power within reasonable limits to determine what is and what is not a legitimate occupation and to determine when the same can be carried on.

Even as far back as the *Slaughter House Cases*, 16 Wall. 36, this court has held that while the butchering of animals was a legitimate occupation, yet the city of New Orleans under its police power could restrict the slaughtering of animals to certain buildings and places within the city limits. If the slaughtering of animals is so affected by the public interest as to permit its regulation by municipal authority, surely the early education of the citizens of a state is also sufficiently fraught with public interest to permit its regulation by the state in its own interest and for its own protection. It may be noted that the quotation from the Slaughter House cases on page 8 of the brief of the plaintiff in error was from the dissenting opinion in that case and not from the judgment of the court, as was also the quotation from Mr. Justice Harlan in *Berea College* v. *Kentucky*, 211 U. S. 45; the actual holding in the Berea College case being that a statute prohibiting instructions to whites and negroes in the same incorporated school was not invalid.

The sweeping language used in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and in *Adair* v. *United States*, 208 U. S. 161, quoted on pages 8 and 12 of defendant's brief, was modified and restricted by this court in *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549, a case that involved the validity of an Iowa statute granting a right of action to injured railway employees regardless of whether they had released the carrier from liability by contribution to or accepting the benefits of the carrier's relief or insurance scheme.

In upholding the constitutionality of this statute as against the objection that it was against public policy and that it interfered with the constitutional freedom of contract, and after expressly referring to *Allgeyer* v. *La.*, 165 U. S. 578,

and *Adair* v. *U. S.*, 208 U. S. 161, and in restricting the language used in those opinions, this court said:

"But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interest of the community. *Crowley* v. *Christensen*, 137 U. S. p. 89; *Jacobson* v. *Massachusetts*, 197 U. S. p. 11. 'It is within the undoubted power of government to restrain some individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property.' *Frisbie* v. *United States*, 157 U. S. pp. 165, 166.

"It it subject also, in the field of state action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. This limitation has had abundant illustration in a variety of circumstances. Thus, in addition to upholding the power of the state to require reasonable maximum charges for public service (*Munn* v. *Illinois*, 94 U. S. 113; *C. B. & Q. R. R. Co.* v. *Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19), and to prescribe the hours of labor for those employed by the state or its municipalities (*Atkin* v. *Kansas*, 191 U. S. 207). This court has sustained the validity of state legislation in

prohibiting the manufacture and sale of intoxicating liquors within the state (*Mugler* v. *Kansas*, 123 U. S. 623; *Crowley* v. *Christensen, supra*); in limiting employment in underground mines or workings, and in smelters and other institutions for the reduction or refining of ores or metals, to eight hours a day except in cases of emergency (*Holden* v. *Hardy*, 169 U. S. 366); in prohibiting the sale of cigarettes without license (*Gundling* v. *Chicago*, 177 U. S. 183); in requiring the redemption in cash of store orders or other evidence of indebtedness issued in payment of wages (*Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13); in prohibiting contracts for options to sell or buy grain or other commodity at a future time (*Booth* v. *Illinois*, 184 U. S. 425); in prohibiting the employment of women in laundries more than ten hours a day (*Muller* v. *Oregon*, 208 U. S. 412); and in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of the weight of the coal as originally produced in the mine (*McLean* v. *Arkansas*, 211 U. S. 539).

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

"The principle was thus stated in *McLean* v. *Arkansas*, 211 U. S. 547, 548: 'The legislature being familiar with

local conditions, is primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Cases cited.) * * * *If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained;* if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

The case holds that in dealing with the relation of employer and employee, that the state legislature necessarily had a wide field of discretion in order to protect the health and safety of workmen, to promote peace and good order, and to insure wholesome conditions of work and freedom from oppression and that the granting of a right of action to injured employees regardless of whether or not they had involved themselves in the carrier's "relief plan" was within the reasonable discretion of the Iowa legislature and was not contrary to the federal constitution.

Surely if the state may legislate to protect its workmen, it may also legislate in respect to the education of the children in such a way as to insure a high standard of citizenry and a more intelligent basis and foundation for the state government.

In *Lawton* v. *Steele*, 152 U. S. 133, after detailing the instances of the proper exercise of the police power, such as regulation of slaughter houses, prohibition of wooden buildings in fire limits, regulation of railways, compulsory vaccination, confinement of the insane and those afflicted with contagious diseases, suppression of obscene publications, prohibition of gambling and sale of intoxicants, the court said:

> "Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Barbier* v. *Connolly,* 113 U. S. 27; *Kidd* v. *Pearson,* 128 U. S. 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."

The case involved the right of the state to confiscate and destroy without judicial process fish nets used in illegal fishing.

In *Erie Railroad Company* v. *Williams,* 233 U. S. 685, which involved a statute of New York requiring railroad companies to pay employees semi-monthly, and which was sustained as a valid exercise of police power as well as a valid exercise of the state's rights to control corporations, in speaking of the guaranty of personal liberty under the constitution, and in holding that it includes the right to contract in respect to time and payment of wages the court said:

> "But liberty of making contracts is subject to conditions in the interest of the public welfare and which shall prevail—principle or condition—cannot be defined by any precise and universal formula. Each instance of asserted conflict must be determined by itself, and it has been said many times that each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest

conflict of serious opinion does not suffice to bring it within the range of judicial cognizance. *C. B. & Q. R. R. Co.* v. *McGuire*, 219 U. S. 549, 565; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389. * * * (and at page 704) But whether the law imposes an unjust burden depends upon its validity, and whether the public welfare is subserved by one system or the other is, as we have said in the first instance, for the legislature to determine, and its judgment will not be reviewed unless 'unmistakably and palpably in excess of legislative power.' *McLean* v. *Arkansas*, *supra*, 211 U. S., p. 547."

It will be noted that *Gouled* v. *U. S.*, 255 U. S. 289, 303, cited on pages 22 and 23 of plaintiffs' brief as an authority in respect to personal liberty involved the Fourth Amendment and not the Fourteenth, and was a case involving searches and seizures. The language quoted on page 23 of plaintiffs' brief does not apply in the slightest to the state of facts involved in this language litigation. The language of an opinion should be used in reference to the facts and to the decisions. The words "judgment affirmed" cannot be used to advantage by the defendant in error in every case. The Gouled case was a conviction for the misuse of the mails in attempting to promote a scheme to defraud the government as to army quartermaster contracts to supply clothing. The defendant's office was searched by detectives without warrant of law, certain papers seized, used by the prosecuting attorney and then returned to the defendant. All this case holds is that the use of papers obtained through an unlawful seizure was improper and in violation of the constitutional provision that one cannot be compelled to give evidence against himself. Personal liberty under the Fourteenth Amendment, equal protection of law, and property rights are not at all involved.

In dealing with liberty of contract, this court in *Miller* v. *Wilson*, 236 U. S. 373, in considering a California statute prohibiting the employment of women in certain industries, attacked on the ground that it was an arbitrary invasion of personal rights contrary to the Fourteenth Amendment, said:

"As the liberty of contract guaranteed by the constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. *C. B. & Q. R. R. Co.* v. *McGuire,* 219 U. S. 549, 567; *Erie R. R.* v. *Williams,* 233 U. S. 685, 699; *Coppage* v. *Kansas, ante,* pp. 1, 18. Upon this point the recent decisions of this court upholding other statutes limiting the hours of labor of women must be regarded as decisive."

In respect to interference with property rights; the property rights of the plaintiffs in this case are assumed and asserted rather than proven. It may be true that plaintiffs have $250,000.00 invested in schools throughout the state, but the value of these schools does not depend upon whether or not a foreign language is taught within them to young children. The value of the real estate remains the same. All property is held subject to the police power. The fact that real estate may be used for the brewing, distillation or dispensing of malt and spirituous liquors does not prevent the passage and enforcement by a state of prohibition legislation.

Mugler v. *Kansas,* 123 U. S. 623.

In fact if plaintiffs would use their schools for the diffusion of American ideals and for instruction in English rather than in foreign tongues their value would be enhanced rather than diminished. The number as well as the quality of additional pupils they would attract by the adoption of this system of education would more than compensate for the few they would lose. If plaintiffs' schools exist for educational and religious purposes neither is affected by the foreign language legislation. If these schools were founded to perpetuate foreign languages and foreign ideals in the hearts of American children, then they deserve to be closely regulated if not abolished.

All property as well as personal liberty is held and enjoyed subject to the police power, of which this statute, as we urge in Point I, is a reasonable exercise.

V.

Under the police power the State has the right to regulate schools and courses of study.

It is urged on pages 61 to 63 of plaintiffs' brief that parents have a right to educate their children in schools in any subjects they deem proper, a right superior to that of the state to supervise such an education, and two Nebraska cases: *State* v. *School District*, 31 Neb. 552, and *State* v. *Ferguson*, 144 N. W. 1039, are cited in support of this theory. An examination of these two cases shows that they turn on the construction of a Nebraska statute rather than on any broad principle of fundamental rights. These cases were authority in Nebraska only and insofar as they bear on this foreign language litigation they have been overruled and superseded by the cases of *Nebraska District Evangelical Synod* v. *McKelvie*, 104 Neb. 93, 187 Northwestern 927, and by *State* v. *Meyer*, 187 Northwestern 100.

The power of the state to regulate or prohibit private schools is subject to the same limitations as the power to regulate property rights in general. The legislature under the police power may regulate education in private schools, but of course the exercise of such police power must not be arbitrary and must be limited to the preservation of the public safety, the public health, the public morals and the public welfare.

In *Berea College* v. *Kentucky*, 211 U. S. 45, a Kentucky statute which forbade any corporation maintaining schools attended by both whites and negroes was upheld.

In *Andrew* v. *Webber*, 108 Ind. 31, it was held that school authorities have the right to determine the course of study, which pupils must follow under penalty of expulsion.

In *State* v. *Bailey*, 157 Ind. 234, 329, although a decision by a state court, the language used is such a clear exposition of the principle that it will bear quotation, and is as follows:

> "The natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state and may be restricted and regulated by municipal laws. * * * The matter of education is deemed a legitimate function of the state and with us is imposed upon the legislature as a duty by imperative provisions of the constitution. * * * The subject has always been regarded as within the purview of legislative authority. How far this interference should extend is a question, not of constitutional power for the courts, but of expediency and propriety, which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with this exercise of legislative judgment; and to do so would be to invade the province, which by the constitution is assigned exclusively to the lawmaking power."

On the same general principle the case of *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, is instructive. This court in that case held that a statute of Kansas intended to regulate fire insurance rates and exempting co-operative companies, insuring farm buildings, from such regulation was valid under the federal constitution.

Surely if as the court held in that case the business of fire insurance was so "clothed with a public interest" that it was subject "to be controlled by the public for the public good" if the storage of grain in public warehouses may be regulated (*Munn* v. *Ill.*, 94 Ill. 113; *Budd* v. *N. Y.*, 143 U. S. 517) as well as interest rates, transportation charges, hotel accommodations, hours of labor, location of industries, conduct of banking, renting of apartments, then surely schools, both public and parochial, the education of the young, the development of citizens is of sufficient public interest to sustain statutory regulation by a sovereign state. The test is public interest, not devotion of property to a general public use. The right to demand and receive service is not the test of the right to regulate. Private persons and private property lose their private character and become clothed with sufficient public interest to warrant regulation, when used or employed

in matters of public consequence, which affect the community at large.

The underlying principle is that businesses of certain kinds hold such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation.

The court goes on to say that the statute was not unlawfully discriminatory, because it exempts co-operative companies insuring farm property, holding that a discrimination is valid if not arbitrary, if it is not "outside of that wide discretion which a legislature may exercise. A legislative clasification may rest on narrow distinctions. Legislation is addressed to evils as they may appear and degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union Co. Bank,* 207 U. S. 251. There are certainly differences between stock companies such as complainant is and mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co.* v. *Doggs,* 172 U. S. 557."

From the testimony and from the argument in the plaintiffs' brief, it would appear that the use of a foreign language was justified, and in fact necessary in the teaching of English, that it is necessary to use German to teach a German boy English. Plaintiffs in this argument overlooked the fact that in the English instruction to foreigners, as given in the night schools of New York City, English alone is employed. The well known Berlitz system of foreign language instruction is based on instruction in the foreign language alone. We all came into the world with no knowledge of any language, and most of us learned English from hearing it spoken. A German child may be taught English in the same way. It is not necessary to teach him more German in order that he may learn a little English or to use German to instruct him in English.

The opinions of well known educators on foreign language teaching are instructive and entirely refute plaintiffs' argument.

Charles Hart Handschin, Professor of German in Miami University, in Bulletin No. 3 of 1913 of the United States Bureau of Education on page 31 declares that from the time the teaching of German was introduced into the United States (at Germantown, Pa., in 1702) the object was to enable the young to understand German sermons and to keep German ideals before them in home and in school, and that the English language was often excluded from the curriculum of such schools.

Professor Handschin (pp. 94 to 101) in foreign language instruction advocates the natural or direct method whereby the language sought to be taught is alone the medium of instruction.

Leopold Bohlson, a German Oberlehrer in the Realschulen of Berlin, Lecturer on methods of teaching French and German in the Teachers College of Columbia University in 1902 and 1903, and Imperial Commissioner to the St. Louis Exposition, in his work entitled "The Teaching of Modern Languages," says on page 22:

> "In teaching of languages the pupil should be trained to converse with the instructor in the foreign tongue; that there is not the least doubt that the foreign language must be spoken in the class; that in teaching a foreign language one must get into the foreign spirit, and in teaching German have a map of Germany in the classroom, pictures of great Germans and of characteristic German landscapes."

In a discussion of the analytic inductive method of teaching languages advocated by the author, the predominate thought is to get away from the mother tongue and get bodily into the foreign language. He quotes Martin Hartmann, the great language teacher of Saxony, who urged the employment of methods, which teach a foreign language without the mediation of the familiar native tongue.

Otto Jesperson, Ph. D., Professor of English in the University of Copenhagen, in his work "How to Teach a Foreign Language," published in London in August, 1917, declares that a foreign language should be taught by means of the foreign language itself and says on page 48:

> "The popular opinion among those, who have not thought the matter over, or who have not given sufficiently careful attention to their own mental processes is that a foreign language can be understood only by transposing it into ones mother tongue, but this is not so. In teaching a Dane English, you must transplant him into English bodily and not through the medium of translation into English. I directly and spontaneously connect the idea with the language in which it is expressed without going through any roundabout method through the words of the native language."

Throughout his whole work of 192 pages Professor Jesperson urges and advocates the use of a foreign language alone in foreign language teaching.

Other works advocating the direct method of language instruction by the medium of the language alone by noted pedagogues are:

"Fur Kleine Leute," by A. T. Gronow, published by Ginn & Co.

"Die Direkte Method." by Marc. De. Valette, published by Wm. Jenkins Co., N. Y.

According to the latest methods of teaching languages, to teach a German boy English, English should be used from the start. It is not necessary to teach him more German in order to teach him more English.

ANSWERING THE ARGUMENT OF PLAINTIFF'S BRIEF.

The defendants agree with the plaintiffs' statement of the case on pages 1 to 3 of plaintiffs' brief, but take issue with every contention set forth on the latter pages. The allega-

tions of the intervenor's petition were merely asserted and not proved (Record pp. 2 to 13, 33 to 70).

In the description of the "Intent and Purpose of the Act" on page 14 of their brief, plaintiffs fall into many errors. The act does not prohibit the giving of instruction in any subject in any foreign language at any time by any person, but merely regulates foreign language instruction by, so far as schools are concerned, confining it to pupils who have passed the eighth grade.

It does not prohibit the study of any subject in any language other than English by any person in any school. Such study is not mentioned in the act. The use of a foreign language only is prohibited.

Instruction through the medium of foreign languages in private, denominational or parochial schools is only prohibited to children under the eighth grade.

The prohibitions in the act are merely incidental. The purpose of the act is to insure the grounding of Nebraska children in the English language. *By our experience in the Meyer case,* 187 Northwestern 100, *our legislature learned that the only practical method of insuring instruction in the English language was to absolutely prohibit the instruction in German to children under the eighth grade. If this was not done five minutes of instruction in English would be given and several hours of instruction in German.*

The opinions of Herbert Spencer and John Stuart Mills, set forth on page 24 of the plaintiffs' brief are interesting as the opinions of advanced thinkers, but after all they are merely opinions, and we are governed by the legislation enacted in the laws of the state, rather than by the opinions of noted persons. Practically all advanced legislation has been opposed by some men of pronounced intellectual attainments.

In the language of the court in *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389:

> "Against that conservation of the mind, which puts to question every new act of regulating legislation, and regards the legislation invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare, and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

Many of the citations in plaintiffs' brief lose their value when one examines their connection and sees what was actually decided. For instance the case of *Arver* v. *United States*, 245 U. S. 366, is cited on page 36 of plaintiffs' brief, as an authority to the effect that the Nebraska statute abridged the immunities of a citizen of the United States. The Arver case was the case sustaining the validity of the draft law as against the argument that the selective draft interfered with religious beliefs and imposed involuntary servitude.

To refute the argument on page 48 of plaintiffs' brief that in Nebraska we consider it dangerous to the welfare of the state the study of the works of Virgil, Homer, Dante or Goethe in the original language, it is only necessary to compare plaintiffs' argument with the statute itself. There is nothing in the statute which prohibits the study of the works of Grotius in the original tongue. The assertion on page 48 of plaintiffs' brief: "The lawyers who undertake the study of the original Code Napoleon are subject to prosecution; the student of the drama who would study the original of Moliere is subject to a jail sentence of thirty days. If the act in question is valid, the ambitious seekers after truth, who desire to study in a school in the original languages the Divine Comedy

of Dante, the Dialogues of Gallileo, or the Philippics of Demosthenes, will be required to engage in this dangerous and hazardous occupation outside the territorial confines of Nebraska." is false as well as exaggerated. Our statute does not prohibit anyone who has passed the eighth grade from studying a foreign language or from studying foreign authors in foreign tongues. The number of children under the eighth grade, who would desire to study the works of Grotius, Demosthenes, Voltaire or Kant in the original Greek, Italian, Greek and French are negligible in Nebraska.

The argument on page 51 of plaintiffs' brief that the Nebraska Foreign Language Act is freak legislation does not take into consideration that twenty-one other states have passed similar legislation set forth on pages 25-31 of this brief.

The fact that our statute was enacted on April 14, 1921, two years after the cessation of hostilities in the world war shows that it was not a form of war hysteria.

Plaintiffs' whole argument that the act is undesirable should have been addressed to the legislature rather than to this court. This court has answered all such arguments in the following language of Judge Field in the case of *Mobile County* v. *Kimball*, 102 U. S. 691, a case sustaining legislation authorizing a bond issue for Mobile County to be used in the improvement of Mobile Harbor:

> "But this court is not the harbor, in which people of a city or county can find a refuge from ill-advised, unequal and opressive state legislation. The judicial power of the federal government can only be involved when some right under the constitution, laws or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change in their representatives."

CONCLUSION.

The American government created by our forefathers, maintained by our citizenry, cherished from generation to generation for the public weal, constantly changing to accommodate itself to the advancement of mankind, is the greatest human creation of the latter centuries. In the idealistic beauty of its conception it surpasses the Taj Mahal. In its balanced representation and co-ordination of power it excels the symmetry of the Athenian Parthenon. We trust it will endure as the Pyramids of Egypt. Its foundations rest on the intelligence and the solidarity of the electorate.

When the Higher Power observed the efforts of the people on the plains of Shinar to build a city supplemented by a tower which would suffice to protect them from the wrath of God in the form of flood waters, He said: "Behold, they are one people with one language, and nothing that they undertake shall be withholden from them." The method adopted to check the building of the tower was to confuse the tongues of the workmen so that they were unable to communicate with each other. As a result the Tower of Babel can no longer be distinguished from the sands of the desert. This court will never classify the English language and the American government as a threatened menace as Jehovah considered the Tower of Babel. We trust that the same insidious peril to the American government will not be permitted by this court, and that the method employed in Nebraska by the people of Nebraska for the safety of the state will not be curtailed.

Our foreign language statute is merely the exercise by the state of the right of the state to so supervise the education of its youth that in Nebraska the language of our country shall be the language of the heart.

In the development of our Republic let our standard be: One God, the God of our fathers; one flag, the banner symbolizing the bitter sacrifices of American soldiers in the field from Valley Forge to the Meuse-Argonne; one language, the tongue of the land where these plaintiffs have sought asylum.

Respectfully submitted,

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Dated Lincoln, Nebraska, December 1, 1922.